Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

NANCY G. PERÉ, individually and on behalf of her minor children, Matthew Reed Peré and Marci Danielle Peré,

Petitioner,

versus

NUOVO PIGNONE S.p.A,

Respondent.

On Petition For Writ Of Certiorari To Review Decision Of The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. TIERING: Whether Nuovo Pignone was ever a sovereign agency or instrumentality of the Government of Italy when it exercised business, not government functions, and was not created directly by the sovereign but was only a creature of a creature of the state. (SPLIT IN CIRCUITS – Rule 10(a).)

2. TIMING: Whether an entity that is privatized before commencement of the lawsuit may be considered a "foreign sovereign" under the FSIA. (SPLIT IN CIRCUITS – Rule 10(a).)

3. COMMERCIAL ACTIVITY: Whether a defendant engaged in purely commercial activities, including substantial commercial activity in the United States and purchase of a turbine starter engine manufactured in the United States, then installing it aboard a platform constructed at a shipyard in Bayou Black, Louisiana, and shipped off the coast of Africa for installation there, where it was operated by a U.S. oil company, and later redesigned, repaired and maintained under contracts with U.S. service companies, can be said to have engaged in an activity which has no "nexus", "material connection", or "direct effect" in the United States. (SPLIT IN CIRCUITS – Rule 10(a).)

4. WAIVER: Whether Nuovo Pignone's repeated agreements to arbitrate contract disputes in foreign forums and to be bound by the laws of other states including Texas and Louisiana, constitute "waiver" of its right to claim sovereign immunity. (SPLIT IN CIRCUITS – Rule 10(a).)

LIST OF ALL PARTIES

Nancy G. Peré Matthew Reed Peré and Marci Danielle Peré	Plaintiffs/ Petitioners
Tuthill Corporation and Coppus Engineering	Defendants in Principal Action Aligned with Plaintiffs on writ application
Nuovo Pignone, S.p.A.	Defendant/ Respondent
General Electric Company	Defendants in Principal Action
Cabinda Gulf Oil Company Division of the Chevron Company	Defendants in Principal Action

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CITATIONS AND SUMMARIES OF DECISIONS BY LOWER COURTS

(1) ***Decision by the Trial Judge***: (Unreported – See Appendix B)

Judge Doherty of the Western District of Louisiana, Lafayette-Opelousas Division, denied Nuovo Pignone's exception to jurisdiction.

(a) ***Tiering***: Judge Doherty recognized the split in the circuits on the question of whether a twice-removed foreign government agency has the right to claim sovereign immunity. The judge refused to follow the Ninth Circuit decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995). She chose to follow decisions in the Fifth and Seventh Circuits. See, *In Re: Aircrash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996); *Delgado v. Shell Oil Company*, 890 F.Supp 1315 (S.D. Tex. 1995); *Talbot v. Agsaipem A. G.*, 835 F.Supp 352 (S.D. Tex. 1993). She nevertheless commented that the *Gates* analysis was "strong and persuasive".

(b) ***Timing***: Again the judge recognized the split in the circuits on the question of whether sovereign status was to be determined on the date of the accident or the date of the filing of the lawsuit. The court chose to follow *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994), rather than *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993) and *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988).

(c) ***Commercial Activity***: the court found that the commercial activity exception applied and that Nuovo Pignone was subject to the jurisdiction of the court.

(2) ***Decision by the Fifth Circuit*** **(Peré v. Nuovo Pignone, Inc.,** 150 F.3d 477 (5th Cir. 1998) – Appendix A)

The Fifth Circuit reversed the trial court and has dismissed plaintiff's claim against Nuovo Pignone for lack of jurisdiction under the FSIA.

On the question of "timing" the court recognized the split in the circuits and chose to follow *Grossman* rather than *Straub* – as had the trial judge.

The court looked at the "commercial activities" exception and applied the Fifth Circuit's standard in *Stena Rederi A.B. v. Comision de Contratos,* 923 F.2d 380 (5th Cir. 1991), holding that the Perés had failed to meet the weighty "material connection" requirement of *Stena.*

STATEMENT OF JURISDICTION

This litigation involves application of the Foreign Sovereign Immunities Act, 28 USC § 1602 et seq. – the United States courts have federal question jurisdiction.

The United States Supreme Court has jurisdiction to review the judgment of the Fifth Circuit Court of Appeals rendered September 21, 1998, by issuance of a writ of certiorari under 28 USC § 1254(1).

This writ application demonstrates that there are SPLITS IN THE CIRCUITS on four issues which are important to reaching a decision on the question of FSIA jurisdiction. Therefore, the Court has jurisdiction to issue a writ of certiorari under its Rule 10(a) because "a United States court of appeals has entered a decision in conflict

with the decision of another United States court of appeals on the same important matter".

STATUTES INVOLVED

(See Appendix G.)

STATEMENT OF THE CASE

Marcus Daniel Peré was employed by Chevron Oil Company in March of 1979. In 1993 he was working aboard a production platform off the coast of Cabinda, Angola, West Africa. On October 16, 1993, while in the course and scope of his employment, Marcus Peré was killed by the explosion of a turbine engine, which he and a fellow employee were attempting to repair.

The turbine engine was owned by Nuovo Pignone, Inc. and was part of the platform equipment which Chevron Oil Company operated. It had been manufactured and purchased in the United States, then was sent to Italy for inclusion into a larger compressor system which was shipped back to Bayou Black, Louisiana for further assembly and installation aboard a platform, under Nuovo Pignone's supervision there (Appendix F, 18-22). The assembled platform was then towed to Cabinda Gulf, offshore Angola, West Africa. While on the platform, the turbine was "reconfigured", repaired, maintained and serviced by U.S. service companies, under contracts with Nuovo Pignone. Chevron operated the platform upon which the turbine was installed, and Mr. Peré worked for

Chevron. The reconfigured turbine compressor exploded, killing Mr. Peré; no study had been made to determine whether the reconfiguration modifications were safe for the compressor accessories – like the starter. (Appendix F, 11, 14-16.)

Mr. Peré is survived by his widow, Nancy Peré, and their two minor children, Matthew Reed Peré and Marci Danielle Peré. The Plaintiffs have brought suit against Nuovo Pignone and its affiliate companies, as owners, designers and manufacturers of the defective turbine system, and against Coppus Engineering and Tuthill Corporation, as manufacturers of the defective turbine starter, and against Agip Petroleum Company, as an owner-operator of the offshore platform; Defendants' insurers are also named as defendants.

Plaintiffs have stated a cause of action in negligence for the faulty design, manufacture, modification and marketing of the turbine system, alleging the defective system had a propensity to explode and was dangerous, and that Defendants failed to warn Plaintiff of these dangers; and further that Defendants assembled, "customized" and modified the system, improperly combining it with a natural gas turbine system, causing it to explode and kill Mr. Peré. Plaintiffs also allege that the Defendants acted with wanton and gross negligence and intentional indifference to the safety and welfare of persons who would be operating the turbine system. Plaintiffs have sued under Texas and Louisiana state tort laws, as well as under contract warranty and relevant federal maritime laws.

Nuovo Pignone, as owner of the defective and dangerous turbine system, filed an exception to federal jurisdiction, alleging its sovereign immunity from suit under the Foreign Sovereign Immunities Act, 28 USC § 1602 et seq.

Plaintiffs argued before the district court and the court of appeals that Nuovo Pignone should not be allowed to assert sovereign immunity, because it is not in any sense a "sovereign" (QUESTION NO. 1). At the time of the accident Nuovo Pignone was majority owned by a commercial joint stock company which reported to the Italian Ministry of Treasury. That entity, Ente Nazionale Idrocabun (ENI), owned the majority of stock in Nuovo Pignone; private entities owned the balance of the stock. No evidence was introduced to show that Nuovo Pignone was in any way especially controlled by the state or engaged in any governmental or political functions. Nuovo Pignone's activities were purely of a private, commercial nature. There is a split in the circuits, but Plaintiffs believe the best interpretation of the FSIA, as recognized by commentators and by some of the circuits, is that an entity which is twice-removed from the government of Italy, as Nuovo Pignone is, should not be entitled to claim sovereign immunity – this is referred to as the *"tiering"* issue.

A second issue has to do with *"timing"*: whether Nuovo Pignone can claim sovereign immunity though the government of Italy, through ENI, did not have a majority ownership in Nuovo Pignone at the time the lawsuit was filed (QUESTION NO. 2). There is a split in the circuits on this issue as well: Some circuits look at the ownership of the defendant entity as of the date of the accident, other

circuits look at ownership as of the date of the filing of the lawsuit.

A third legal issue over which the circuits are split has to do with how courts weigh the "connection" between a cause of action and the defendant's contacts or activities here in the United States (QUESTION NO. 3). One commentator points out that there are "numerous variations" in how the courts approach this question. The Fifth Circuit has been requiring plaintiffs to show "substantial" and "material" connection between the particular event giving rise to the lawsuit and the defendant's commercial activity in the United States. Other circuits require less connection. The Fifth Circuit's standard seems more onerous and burdensome than need be, resulting in an extension of sovereign immunity into areas where that grant is no longer appropriate.

We are also confronted with the issue of *"waiver"*: Whether Nuovo Pignone's contractual consent to have disputes between it and its business partners decided in the forums of other states, or by arbitration, in accordance with substantive laws of other states (including Texas), constitute a waiver of its right to claim sovereign immunity (QUESTION NO. 4).

FSIA jurisprudence is in disarray. Some commentators are referring to the present situation as intolerable and disastrous. This lawsuit raises important issues spanning the spectrum of FSIA litigation. Plaintiffs believe there are compelling reasons for the Court to grant writs.

ARGUMENT

(1) TIERING: Whether Nuovo Pignone was ever a sovereign agency or instrumentality of the Government of Italy when it exercised business, not government functions, and was not created directly by the sovereign but was only a creature of a creature of the state. (SPLIT IN CIRCUITS – Rule 10(a).)

The trial judge has referred to this as a "difficult issue", and recognized a SPLIT IN THE CIRCUITS, citing (a) *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), and contrasting that decision to (b) *In Re Aircrash Disaster near Roselawn, Indiana on October 31, 1994*, 96 F.3d (7th Cir. 1996).

The split in the circuits on this issue is being lamented by the legal community:

> Courts principally disagree as to whether to allow "tiering" – classifying an entity as an agency or instrumentality of a foreign state when the state does not own a direct interest in the entity. This particular split is solidifying as these cases appear more frequently. In fact, since September, 1996 the Ninth Circuit has reaffirmed its position that tiering should not be allowed, while the Seventh Circuit has directed that tiering is permissible, specifically disagreeing with the Ninth Circuit view. Joseph Hardy, Jr., *"Wipe Away the Tears: Determining Agency or Instrumentality Status under the Foreign Sovereign Immunities Act"*, 31 Georgia Law Review 1121 (1997). *Citing, Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996); *In Re Air Crash Disaster Near*

Roselawn, Indiana, 96 F.3d 932 (939-941) (7th Cir. 1996).

Mr. Hardy's article finds the split troubling, and points out that "tiering" is contrary to the policy and language of the FSIA:

> Both the language of the FSIA and its legislative history indicate that tiered entities do not qualify as "agencies or instrumentalities of a foreign state" based solely upon their ownership by an entity which is itself majority-owned by a foreign state
>
> * * *
>
> The statutory language of the FSIA suggests that agencies or instrumentalities are included in the immunities and federal jurisdiction of the FSIA, but do not themselves become statutorily defined foreign states able to grant instrumentality status to entities below them. *"Wipe Away the Tears . . . ", supra*, p. 1129.

The author cites *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), and believes that decision (disallowing tiering) should be favored over rules developed in other circuits.

There are compelling reasons for the Supreme Court to take up this matter and to lay down a uniform standard. The rule in some circuits, and in the decision of the lower courts in this case, allowing "tiering" is contrary to the intent of Congress in enacting the FSIA and expands the doctrine of sovereign immunity, which Congress meant generally to restrict to the *political* activities of foreign states. "Tiering" has the effect, not of restricting sovereign immunity to state government activities, but of

expanding the state's sovereign immunity and extending it to business entities created by state agencies for the purpose of competing in international commerce. Abandonment of the "King can do no wrong" doctrine and adoption of a "restrictive" immunity was meant to level the playing field in international business competition. Besides, application of the tiering principle penalizes the Peré family; this Court should be solicitous to assure the family is fairly and justly compensated for the death of its husband-father.

The vast increase in international business activity by state sponsored agencies of the emerging nations, as well as by those of the long prosperous western nations, has greatly increased recourse to the doctrine of sovereign immunity in litigations in the United States:

> As of 1986, state-owned trading enterprises accounted for over 15% of international trade. Thus . . . the FSIA is taking on increasing importance in the resolution of disputes arising out of international trade. Nicholas Evanoff, *"Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts,"* 22 Houston Law Review 629, 630-631 (May 1991).

(2) TIMING: Whether an entity that is privatized before commencement of the lawsuit may be considered a "foreign sovereign" under the FSIA. (SPLIT IN CIRCUITS – Rule 10(a).)

> . . . [C]ases have arisen in which a defendant corporation has been nationalized or denationalized after performing the act on which a

> plaintiff's complaint is based. Because the terms of the FSIA do not recognize the possibility of a change in status, courts in these cases have found it difficult to determine whether these "changed-status" defendants are "sovereigns" under the FSIA. Simmons, *"Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act,"* 90 Columbia Law Rev. 2278, 2279 (Dec. 1990).

We are dealing here with the question of whether a court should look to the alleged sovereign status of Nuovo Pignone at the time of the accident, or at the time of filing the lawsuit. Plaintiffs urge the Court to look at Defendant's status at the time the suit was filed, as was done in *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994).[1]

But the lower courts in the case at bar, recognizing the split in circuits, have chosen to follow the rule announced by the Eighth Circuit in *General Electric Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993).[2]

Because there is a SPLIT IN THE CIRCUITS, there are compelling reasons for this Court to take up this case, to clarify and resolve the conflicting jurisprudence, and to lay down a uniform standard.

Remember, the FSIA was enacted to *restrict* a commercial defendant's right to claim sovereign immunity. Where we are dealing with causes of action which arise *outside* the boundaries of a nation-state, causes of action

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[1] See also, *Rutkowski v. Occidental Chemical Corporation*, 1988 U.S. Dist. LEXIS 11414 (N.D. Ill. 1988); *Ocasek v. Flintkote Co.*, 796 F.Supp. 362 (N.D. Ill. 1992).

[2] For a lengthy review of the "split", see 120 ALR Fed. 542.

arising from business enterprise and competition in international commerce, the United States has no interest in enlarging immunity for twice-removed agencies engaged in such activities. The American understanding of justice, and indeed the understanding of most nations in the world today, does not expect that our courts protect foreign governments from liability incurred in the conduct of commercial activities.

Nuovo Pignone is no longer the instrumentality of a foreign sovereign. It is a large business enterprise capable of shouldering responsibility for its past actions and negligence. A judgment against Nuovo Pignone today will not offend Italian sovereignty in the least.

(3) COMMERCIAL ACTIVITY: **Whether a defendant engaged in purely commercial activities, including substantial commercial activity in the United States and purchase of a turbine starter engine manufactured in the United States, then installing it aboard a platform constructed at a shipyard in Bayou Black, Louisiana, and shipped off the coast of Africa for installation there, where it was operated by a U.S. oil company, and later redesigned, repaired and maintained under contracts with U.S. service companies, can be said to have engaged in an activity which has no "nexus", "material connection", or "direct effect" in the United States. (SPLIT IN CIRCUITS – Rule 10(a).)**

Men of good will today do not believe the king can do no wrong. Men of good will today believe that a

person, whoever he is, must be held accountable for the consequences of his conduct. The United States and the individual states of our country are subject to being sued where they have acted wrongly, and must repair damages which they cause to individuals, whether the individuals be United States citizens or foreigners.

It is one thing to grant a foreign nation immunity from suits in our courts where the cause of action arises within the confines of that nation-state. It is quite another thing to grant immunity for negligent acts committed far beyond its borders, while it engaged in lucrative commercial activities, after entering into contracts and working agreements with various business enterprises of the United States and other nations or with private multinational corporations.

Nuovo Pignone is engaged in oil and gas production around the world. Like its private competitors, it purchases equipment and invests capital in profitable ventures wherever it chooses. Nuovo Pignone realizes about $100 million in annual sales in North America; it has offices in New York, Houston and Los Angeles, and advertises in trade journals distributed in this country. (Appendix F, 1-5, 22, 24-25.)

Nuovo Pignone is acting as a commercial business corporation, not as an arm of the state of Italy. No one is claiming that "King Italy" is invading their territorial space or plundering their oil reserves by doing business. Italy is not acting as a government for political ends, and must be accountable for its conduct in foreign lands. Having married itself to private business corporations in a headlong rush for profits, is it fair and just for Nuovo

Pignone to claim a "sovereign" status to shield itself from ordinary accountability?

Whose interest should our courts be trying to protect? What policy considerations are paramount?

All over the world today, American workers are being employed in the specialized work of exploring for, developing and producing oil and gas resources. These workers commute back and forth from the United States. The U.S. Gulf Coast provides most of these workers, and their participation is important to the economic future of developing nations and to the balanced development of the world's supply of hydrocarbons.

Mr. Peré was not working for the state of Italy. He was not aware of any "sovereign presence" on the platform. He saw no royal seal stamped on the turbine engines. He was working in a venture for profit. His coworkers were not state officials and they brandished no "diplomatic immunity". They were employed by a number of different business entities, and were all ordinary people like himself. The equipment he worked with was like the equipment owned by private enterprises all over the world.

The turbine engine exploded because it was poorly manufactured, designed, assembled and maintained, and because it was being used improperly and in a dangerous manner, without warning. Nuovo Pignone is responsible for its defective equipment and its negligence in maintaining and using that equipment.

Surely, our courts have more interest in recognizing the rights of Mr. Peré and his family – who are U.S.

citizens, employed by a U.S. corporation – than in stretching the limits of the doctrine of sovereign immunity to shield Nuovo Pignone. If there are conflicts in the circuits, if there are different positions being taken by the courts, if the FSIA does not clearly exempt Nuovo Pignone from lawsuit, then all of these uncertainties and variables should be interpreted and applied to protect the Peré family, not to extend the archaic notion that "the King can do no wrong". Defendants claiming sovereign immunity bear the burden of persuasion.

It hardly needs to be stated that summary judgment is only appropriate where the law is clear and there are no disputes on material facts. How can we pretend that standard was reached in the case at bar? The law is not clear; there are splits in the circuits on several of the crucial legal standards this Court must apply. There are serious disputes on almost every factual front. The Fifth Circuit clearly erred in reversing the trial court and extending sovereign immunity to Nuovo Pignone.

The doctrine of sovereign immunity continues to be only "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution". *"Comment: Retroactivity, Implied Waiver, and the FSIA: Is it Time to Reform the Law of Sovereign Immunity?,"* 24 Hofstra Law Review 515, 519 (Winter '95). See also, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

It is said that "the urge to grant sovereign immunity has . . . lost much of its force". Cordozo, *International Law in the New York Courts – 1953*, 40 Cornell LQ 97, 109 (1955).

> It is . . . a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. *Opinion by Chief Justice Marshall, United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824).

With regard to the background and policies underlying enactment of the Foreign Sovereign Immunities Act:

> Until the mid-twentieth century the United States followed the absolute theory of sovereign immunity, under which all foreign states enjoyed complete immunity from U.S. courts. With the rise of international commerce and the resulting increase in domestic claims against foreign states for their commercial activities, the United States in 1952 adopted the restrictive theory of sovereign immunity – granting immunity to foreign states and their instrumentalities only for public, non-commercial activities. This change in policy was affected by a statement of intention expressed by the then U.S. Secretary of State, Mr. Tate – viz., "Tate Letter". *"Wipe Away the Tears . . . ", supra*, p. 1125.

Before the FSIA's passage, there was a swing away from the deference to sovereign immunity in situations where a foreign entity was not acting for government or political purposes but was engaged in commercial enterprise: "these enterprises were treated as private entities and denied the privileges of sovereignty, including sovereign immunity, unless they could show that their activities were of a strictly public nature." Simmons, *"Nationalized and Denationalized Commercial Enterprises*

Under the Foreign Sovereign Immunities Act," 90 Columbia Law Review 2278 (December 1990).[3]

> The present application of the Doctrine of Foreign Sovereign Immunity was significantly influenced by the shift or change in United States policy announced in the May, 1952 letter from the Acting Legal Advisor of the Department of State to the Acting Attorney General. After referring to the classical or "absolute" theory of sovereign immunity, the letter stated that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." 26 Dep't St. Bull. 984, 985 (1952) (Quoting Letter from Jack B. Tate, Acting Legal Advisor, Department of State to Acting Attorney General Phillip B. Perlman (May, 1952)).
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> In the Restatement, it is stated that under the act of state doctrine the courts of the United States "will generally refrain from . . . sitting in

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[3] See also, *Oliver American Trading Company v. United States of Mexico*, 5 F.2d 659 (2nd Cir. 1924); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D. N.Y. 1929). In the report of the House Judiciary Committee hearings prior to enactment of the FSIA, it was stated that a defense of sovereign immunity is appropriate only where a defendant can show it is a foreign state and "that the Plaintiff's claim relates to a public act of the foreign state – that is, an act within the exceptions in sections 1605-1607." H.R. Rep. No. 1489, 94th Cong. 2d Sess. 1, 12 (1976).

judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Restatement (Third) of Foreign Relations § 443(1) (1987).

* * *

The House Report . . . notes that the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial or private acts." *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1531-1532 (11th Cir. 1991). See also, Teitz, *Transnational Litigation* (1996) p. 73.

The drafters of the Act saw it as a response to the need for legislation to deal with the increasing contact of American citizens with foreign states and entities, which contact called into question whether American citizens would have access to the courts in order to resolve ordinary legal disputes. Among the major objectives of the Act was the codification of the so-called "restrictive" principle of sovereign immunity under which the immunity of a foreign sovereign was "restricted" to suits involving a foreign state's public acts and did not extend to suits based on its commercial or private acts, the Act being intended to ensure that the restrictive principle of immunity consistently was applied in litigation before United States courts, thus transferring the determination of sovereign immunity from the Executive Branch to the Judicial Branch. *"Exceptions to Jurisdictional Immunity of Foreign Sovereigns and Their Property Under the*

Foreign Sovereigns Immunity Act of 1976 (28 USC §§ 1602 *et seq.*)", 59 ALR Fed. 99, 103-104.

The FSIA, 28 USC § 1605(a)(2) simply provides that our courts have jurisdiction where the cause of action involves "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere". There is no "material connection" standard laid down.

Certainly, it is proper to require that there be some connection between a cause of action brought in our courts and the interests of people in the United States. But this Court long ago threw aside stultifying protectionist doctrines and attitudes sanctioning "forum disinterest" ("passing the buck"). In *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945) this Court considered the requirements for accepting judicial competence and jurisdiction over foreign corporations doing business in a state:

> Due process requires only that . . . a defendant . . . have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". *Id.*, U.S. p. 316, S.Ct. p. 158.
>
> . . . . [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as these obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances

> hardly be said to be undue. . . . *Id.*, U.S. p. 319, S.Ct. p. 160.

International Shoe has made justice possible in situations where technicality and protectionism had shielded foreigners (out-of-staters) before. We may ask whether the FSIA is being drafted into a revived protectionism.

There is no need to require an injured party to bear a heavy burden in establishing a foreign corporation's commercial activity with the forum state. Foreign corporations are considered subject to the jurisdiction of our federal courts whenever the corporation's "aggregated contacts with the United States as a whole are sufficient, even though the contacts within the state in which the federal court is sitting would not be sufficient if considered alone". Scoles and Hay, *Conflict of Laws* (West 1982), p. 333.

The Fifth Circuit is requiring a heavy burden for proving sufficient commercial activity and connection between the cause of action and the United States or forum state. The Fifth Circuit is asking for "substantial" and "material" connection (*Stena Rederi, supra*). This is bad policy, contrary to the spirit of the time and to the policies underlying the FSIA. The whole purpose of the FSIA was to extend the jurisdiction of our courts over the commercial activities of foreign states and their agencies and instrumentalities, where the interests of our people were involved and judicial remedies were required.

Compare the Fifth Circuit's "material connections" standard with the Ninth Circuit's decision in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), where the court held that slight, irregular contacts

(nexus) between a foreign state's commercial activity in the United States and the plaintiff's grievance was sufficient to give jurisdiction under the FSIA. In *United World Trade v. Mangyshlakneft*, 821 F.Supp. 1405 (D.C. Colo. 1993), personal jurisdiction was determined under a "minimum contacts" test.[4]

Some courts are applying the "based upon" standard by considering whether the foreign corporation is "doing business" in the United States. This "doing business" test "focuses on the connections between the defendant and the United States; by definition it requires no specific connection between the lawsuit and the United States." Newman and Zaslowsky, *Litigating International Commercial Disputes* (West 1996), p. 114. The Fifth Circuit has rejected the "doing business" test, and requires plaintiffs to prove a more intense involvement between the activity out of which the cause of action arises and the forum state. See, *Vencedora Oceania Navigacion v. Compagnie*

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[4] *In Re Rio Grande Transport, Inc.*, 516 F.Supp. 1155 (S.D. M.Y. 1981), the federal court entertained an action brought by an American corporation against a foreign shipping company where the action arose out of a collision between the Plaintiff's vessel and a vessel operated by the defendant on the high seas. To establish jurisdiction over the foreign entity, the federal court found the foreign shipping company had sufficient contact with the United States, in that its vessels regularly call at United States ports for loading and discharging of commercial cargoes, that the shipping company earned substantial income from those activities, and spent substantial monies in the United States in connection with its shipping activities. The court looked not only at the particular vessel and the particular accident in question but at the foreign shipping company's worldwide operation of more than seventy vessels and their connections with the United States.

Nationale Algerienne de Navigation, 730 F.2d 195, 202 (5th Cir. 1984).

In applying the "direct effect" standard for establishing a FSIA "commercial activity" exception, some circuits say the "direct effect" in the United States need not be "substantial" or "foreseeable" (*Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2nd Cir. 1981)); while other circuits (including the Fifth Circuit) insist it *must be* "substantial" and "foreseeable" (*Zernicek v. Brown & Root, Inc.* 826 F.2d 415 (5 Cir. 1987)).

The commentators recognize there is a problem here; there are a multiplicity of standards in use among different courts:

> The lawsuit against the foreign state must also be "based upon" that commercial activity [28 USC 1605 (a)(2)(1988)]. Congress found an act to be based upon a commercial activity if the foreign state's acts had substantial contact with the United States. The Supreme Court has not addressed what constitutes substantial contact under the statute, allowing lower courts to create numerous variations. Amelia McCarthy, *"The Commerical Activity Exception – Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity,"* 77 Marquette Law Review 893, 903 (Summer '94).

(4) Waiver: Whether Nuovo Pignone's repeated agreements to arbitrate contract disputes in foreign forums and to be bound by the laws of other states including Texas and Louisiana, constitute "waiver" of its right to claim sovereign immunity. (SPLIT IN CIRCUITS)

Nuovo Pignone has entered into a number of contracts in which it agrees to arbitration of disputes in foreign forums and the application of non-Italian laws in the interpretation of contracts and resolution of disputes.

Plaintiffs have especially drawn attention to the Reconfiguration Agreement entered into by Nuovo Pignone, effective June 10, 1985, under which the turbine engine and associated compressor equipment were "reconfigured" to increase horsepower and the flow of gases through the compressor. (Faulty "reconfiguration" may have caused the explosion.) Under several provisions of that agreement, Nuovo Pignone agreed the law of the State of Texas would apply in dispute resolution. (See, Reconfiguration Agreement, Appendix E.)

Some courts have rejected "constricted views" which limit a foreign sovereign's "waivers". *Maritime International Nominees Establishment v. Republic of Guinea*, 505 F.Supp. 141 (D.C. 1981).

In *Ohntrup v. Firearms Center, Inc.*, 516 F.Supp. 1281 (E.D. Pa. 1981), the court acknowledged it would be reasonable to conclude that an agreement with a foreign country to arbitrate disputes in, or be governed by the laws of, the United States would constitute an implicit waiver by that foreign country of its sovereign immunity

in the courts of the United States. But Fifth Circuit courts are applying a more rigorous standard. *Castro v. Saudi Arabia*, 510 F.Supp. 309 (W.D. Tex. 1980). Again we see differences of interpretation and application of FSIA standards in the circuits.[5]

> Under a literal reading of Section 165 (a)(1), any 'waiver' by a foreign sovereign would establish both subject-matter and personal jurisdiction in U.S. courts. Newman and Zaslowsky, *Litigating International Commercial Disputes*, (West 1996), p. 120.

CONCLUSION

It has been said that Congress' enactment of the FSIA "did little more than produce a statutory skeleton from which the federal judiciary has been left to create, through a case-by-case decisional process, a fully developed body of sovereign immunity law". *Gibbons v. Udaras na Gaeltrachta*, 549 F.Supp. 1094, 1106 (S.D. N.Y. 1982).

There have been twenty years of jurisprudential creativity, and a number of often conflicting standards have been fashioned:

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[5] Some courts have followed the Judiciary Committee's suggestion that a choice-of-law selection of the law of another state constitutes an immunity waiver. *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Marlowe v. Argentine Naval Comm'n*, 604 F.Supp. 703 (D.C. 1985). Other courts reject that approach. *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284, 1301-1302 (S.D. N.Y. 1980).

> . . . [T]he courts have been unable to agree as to the meaning of the jurisdictional criteria. The resulting ambiguity has been criticized as threatening the important policy of uniformity that underlies the FSIA. Newman and Zaslowsky, *Litigating International Commercial Disputes*, (West 1996), p. 114. See also, J. Dellapenna, *Suing Foreign Governments and Their Corporations* (1988), pp. 157-160.

The judicial application of the FSIA is in disarray. The Supreme Court must do some housekeeping. There are compelling reasons: the jurisprudence needs to be put in order; relevant policies underlying the doctrine of sovereign immunity must be identified and weighed; uniformity is essential. There are splits in the circuits on several key standards which must be balanced to make the FSIA fair and manageable.

This is an area of law where the Supreme Court is particularly and uniquely suited to enter in and announce standards. Can we imagine that the courts of Angola are better situated to deal with the complexities presented in this suit? Can we imagine that the courts of Italy are better suited to deal with the question of proper operation of U.S. manufactured, assembled and maintained turbine equipment operated by U.S. personnel offshore Angola? A refusal by U.S. courts to accept jurisdiction in this case will mean a denial of justice to Mr. Peré's family (and thousands like them), without good reason.[6]

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[6] Mr. Peré was killed by a defect in a product manufactured and serviced by U.S. corporations. To deny his family's right of recovery flies in the face of justice and the "growing tendency" to protect such victims – in product defect cases, commentators

The Court should take this case up for review.

Respectfully submitted,

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have been counseling against "mechanical and clearly inadequate formulas" in favor of "the application of the law most favorable to the plaintiff." Ehrenzweif and Jayme, *Private International Law* (1977), p. 113.

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APPENDIX A

Nancy G. PERE, on behalf of Marci Danielle Pere, on behalf of Matthew Reed Pere, individually and on behalf of her minor children, Plaintiff-Appellee,

v.

NUOVO PIGNONE, INC., et al., Defendants, Nuovo Pignone S P A, Defendant-Appellant, Coppus Engineering; Tuthill Corporation, Defendants-Appellees.

No. 97-30572.

United States Court of Appeals,
Fifth Circuit.

Aug. 7, 1998.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, Chief Judge, and JONES and DUHE, Circuit Judges.

DUHE, Circuit Judge:

Appellee's husband was killed while working on a platform off the coast of West Africa when a starter turbine manufactured by Coppus Engineering exploded. The starter turbine was a component of a turbine system designed and manufactured by Nuovo Pignone. Appellee sued for her husband's wrongful death claiming that the starter turbine and turbine system had been improperly designed and/or manufactured. Appellant, Nuovo Pignone, an Italian company, claimed sovereign immunity under the Foreign Sovereign Immunities Act. 28 U.S.C. § 1602, et seq. The district court found that, although Appellant was a foreign state, the commercial activity

exception to immunity applied and Appellant could be sued. We disagree, holding that the Appellee failed to meet her burden of proof that the commercial activity exception applied.

I.

In 1974, Nuovo Pignone, an Italian company that designs and manufactures turbine systems, bought a starter turbine from Coppus Engineering, a United States company. Nuovo Pignone then sold to Cabinda Gulf Oil Company ("CABGOC"), FOB Italy, a turbine system that incorporated the Coppus starter turbine. Nuovo Pignone manufactured, tested, and inspected the turbine system in Italy. It was then sent to Bayou Black, Louisiana for final assembly by CABGOC's contractor onto a platform. The completed platform was sent to CABGOC in the Molongo field off the coast of Angola, West Africa.

In 1993, Marcus Daniel Pere ("Pere") was employed by Chevron Overseas Petroleum and/or CABGOC as an instrument technician in West Africa. Pere's employer ordered him to a gas injection platform to test the gas turbine system. During the test, the starter turbine exploded killing Pere. Pere's widow sued[1] on behalf of herself and her two children claiming that the Coppus turbine and Nuovo Pignone's turbine system caused

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[1] Coppus Engineering is also suing; however, it is doing so to ensure that Nuovo Pignone remains a party to the litigation. To avoid confusion, this opinion will treat Coppus' arguments as Pere's.

Pere's death because they had been defectively designed and/or manufactured.

Nuovo Pignone moved for summary judgement claiming sovereign immunity by contending it was an agent or instrumentality of the Italian government. It established that Ente Nazionale Idrocaburi ("ENI") was the majority shareholder at the time of the accident and that the Republic of Italy created ENI to lead Italy's oil and gas exploration and development. Thus, Nuovo Pignone argued, because ENI is an agent or instrumentality of the Italian government, it was a foreign state entitled to immunity. The district court agreed. It, however, denied Nuovo Pignone's request for dismissal concluding that Nuovo Pignone was not entitled to sovereign immunity because of its commercial activities in the United States. Nuovo Pignone appeals.

II.

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 et. seq., provides the sole basis for obtaining jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The FSIA includes agents or instrumentalities[2] of a foreign state within the

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[2] 28 U.S.C. § 1603(a), (b)(1), (b)(2) provide:

(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

definition of "foreign state". To bring suit, the plaintiff must establish that one of the exceptions listed in §§ 1605 and 1607 applies. This Court must decide whether Nuovo Pignone is a foreign state, and if it is, whether it may still be sued under the commercial activity and implicit waiver exceptions, *see* § 1605(a)(1), (2) infra.

A. STANDARD OF REVIEW

We review a district court's application of the FSIA de novo. *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 (5th Cir.1992).

B. ANALYSIS

1. Whether the FSIA Applies

Pere argues that the district court erred in applying the FSIA because it looked to Nuovo Pignone's ownership at the time the explosion occurred, rather than at the time suit was filed. When Pere sued, Nuovo Pignone was no longer a foreign state because ENI had transferred a majority of the Nuovo Pignone stock to a consortium of private companies. In support of her argument, Pere cites *Straub v. A.P. Green*, 38 F.3d 448 (9th Cir.1994) which

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(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof[.]

looked at the defendant's identity at the time suit was filed. She acknowledges that *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir.1993) holds that whether an entity qualifies as a foreign sovereign is determined at the time the litigated event occurred. Pere contends, however, that the *Straub* court's reasoning is better because it is more in keeping with the FSIA's legislative history.

The FSIA's purpose was to promote harmonious international relations. *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir.1994). Pere argues that generally international relations would remain unaffected when a plaintiff sues an entity which was immune at the time of the disputed event but is now private, therefore, giving Nuovo Pignone immunity does not achieve any governmental purpose. We disagree.

Whether the FSIA covers an entity now private that was state owned at the time of the disputed event(s) is a first impression within this Circuit. Having studied both *Straub* and *General Electric*, we are persuaded by the Eighth Circuit's reasoning in *General Electric*. As the Eighth Circuit stated, "the doctrine of foreign state sovereign immunity was created to effectuate general notions of comity among nations." *Id.* at 1381 (internal quotations and citations omitted). The foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed. Thus, courts are to look to the defendant's status at the time the litigated events occurred. *Straub* is distinguishable because it addresses different facts. In *Straub*, the Ninth Circuit was determining how to treat a corporation that became a foreign state for FSIA purposes after

the disputed events occurred but before suit was filed.[3] *Straub*, 38 F.3d at 451. We, therefore, affirm the district court's finding that Nuovo Pignone is a foreign state under the FSIA.

2. FSIA Exceptions

a. Commercial Activity

The district court found that the "commercial activities" exception to the FSIA applied. Under § 1605(a)(2), a foreign state is not immune when the action is:

> "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

"Commercial activity" is defined as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). In determining the commercial character of an activity, courts look to the nature rather than the purpose of the act or transaction. *Id.* For the commercial activity exception to apply here, Nuovo Pignone's actions must fall within the second listed exception. In other words, the suit must be "based upon . . . an act performed within the United States in

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[3] This opinion does not address such a situation.

connection with a commercial activity of the foreign state elsewhere". The district court correctly found that the commercial activity upon which the plaintiff's cause of action was based was the design and manufacture of turbine systems. It further found that the act performed in the United States in connection with that activity was Nuovo Pignone's sending a representative to Bayou Black to consult in the final assembly of the system onto the platform. We disagree.

We turn first to the issue of each party's burden of proof. Initially, the party seeking immunity must show the district court that it is a foreign state potentially entitled to immunity under the FSIA. Once that party makes such a showing, the burden shifts to the opposing party to raise the exceptions to sovereign immunity and to assert facts that would establish these exceptions. The ultimate burden of proving that the FSIA applies, though, remains upon the party seeking immunity. *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana*, 923 F.2d 380, 390 n. 14 (5th Cir.1991); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir.1992). Here, Nuovo Pignone has proven that it is a foreign state entitled to immunity; thus, the burden has shifted to Pere to prove that Nuovo Pignone performed an act within the United States in connection with the commercial activity performed elsewhere. Pere asserts that Nuovo Pignone's sending representatives to Bayou Black, Louisiana to consult on the final assembly was such an act. Assuming arguendo that the consultation was a commercial act performed within the United States, Pere still fails to meet her burden of proof.

To determine whether the availability to consult during the Bayou Black assembly was in connection with Nuovo Pignone's design/manufacture in Italy, we look to our prior cases to find the definition of "in connection with". In *Stena*, we held that the connection between the commercial activity and the plaintiff's complaint had to be material. *Id.* at 387. However, when the "in connection with" prong applies, "any material connection between 'commercial activity elsewhere' and the plaintiff's complaints . . . is irrelevant to the determination of subject matter jurisdiction." *Id.* at 388. Under this prong, the material connection must exist between the act performed in the United States and plaintiff's cause of action. Here, then, the material connection must exist between the availability for consultation during final assembly in Bayou Black and Pere's allegations of wrongful death due to improper design and/or manufacture. Pere fails to show such a material connection. The components of the turbine system were manufactured, tested, and delivered to CABGOC in Italy. More importantly, once the components arrived in Bayou Black, Nuovo Pignone did not perform the final assembly; rather, it was CABGOC's contractor who performed this task. Concededly, Nuovo Pignone did send representatives to consult on the mechanical erection of the components onto the platform; however, there is no indication in the record concerning the extent or nature of the consultation or to show it as an integral part of the design or manufacture. While this Court is told that the Nuovo Pignone representatives consulted, we are left to guess at what the consultation involved. There is simply no indication that the final assembly in Bayou Black was a part of the design or

manufacture that occurred in Italy. Thus, we cannot say that there is a material connection between Nuovo Pignone sending consultants to Bayou Black and Pere's wrongful death action.

b. Waiver

Pere argues that the district court did not have to consider the commercial activity exception because Nuovo Pignone has implicitly waived its immunity. The FSIA allows a foreign state to waive its immunity either explicitly or implicitly, 28 U.S.C. § 1605(a)(1), but it does not state how implicit waiver occurs. The legislative history reveals, though, that implicit waiver may be found in three situations: 1) when a foreign state agrees to arbitration in another country; 2) when a foreign state agrees that the laws of another country govern a contract; and 3) when a foreign state files a responsive pleading without raising the immunity defense. H. Rep. No. 1487, 94th Cong.2d Sess. 18, reprinted in 1976, U.S.C.C.A.N. 6604, 6617. *See also, Arriba Ltd.*, 962 F.2d at 539 n. 22. The waiver exception is to be narrowly construed. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir.1987).

Here, Pere argues that Nuovo Pignone implicitly waived its sovereign immunity by virtue of a 1985 contract it made with CABGOC. That contract concerned the overhaul of the FC-1C compressor train that included the starter turbine that exploded. In provision 19 of that contract, Nuovo Pignone agreed that the laws of Texas would govern questions concerning the performance or

execution of the overhaul contract. Pere contends that this provision is an implied waiver. We disagree.

First, in cases in which implied waiver based upon a contract has been found, the contract was between the parties suing and being sued. *See Eckert International v. The Government of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir.1994); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir.1987); *Kramer v. Boeing, Co.*, 705 F.Supp. 1392 (D.Minn.1989). That is not the case here. Moreover, when courts analyze whether a contract's choice of law provision constitutes implicit waiver, they look to the implied intent of the parties. *See Eckert Int'l*, 32 F.3d at 80. Having studied the 1985 agreement, we find no implied intent of Nuovo Pignone to be responsible to third parties. Hence, Nuovo Pignone has not impliedly waived its sovereign immunity.

CONCLUSION

For the reasons stated, we AFFIRM IN PART, REVERSE IN PART and REMAND.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

NANCY G. PERÉ, ET UX	CIVIL ACTION NUMBER: 94-1889
VERSUS	
NUOVO PIGNONE, INC., ET AL	JUDGE DOHERTY
	MAGISTRATE JUDGE METHVIN

MEMORANDUM RULING

(Filed Apr. 30, 1997)

Before this Court is Defendant's Nuovo Pignone S.p.A.'s ("Nuovo Pignone") Motion for Summary Judgment. Nuovo Pignone contends that it is immune under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S. C. § 1602, et seq., and therefore this Court lacks jurisdiction over plaintiff's, Nancy G. Peré's, complaint against Nuovo Pignone. Plaintiff opposes this motion and submits a cross-motion for summary judgment contending Nuovo Pignone is not entitled to immunity under the FSIA. Defendants Coppus Engineering and Tuthill Corporation have also submitted an opposition to Nuovo Pignone's Motion for Summary Judgment.

Facts

The relevant, undisputed facts of this matter are as follows. Marcus Daniel Peré was employed by Chevron

Overseas Petroleum and/or Cabinda Gulf Oil Co. ("CABGOC"), a division of Chevron, as an instrument technician in West Africa. On the morning of October 16, 1993, Peré was ordered to gas injection platform FOX ("GIP-FOX"), located approximately seven to ten miles off the coast of Cabinda, Angola (the coast of West Africa), to administer testing procedures on a gas turbine system. An explosion occurred during this procedure, killing Peré. Peré's widow, Nancy Peré, brings this suit.

Plaintiff's claim is that a defectively manufactured and/or designed turbine system caused the accident and death of Peré; consequently, the Court will review the history of the turbine system. Coppus Engineering, and its successor corporation, Tuthill, is a United States manufacturer of starter turbines, which are part of the subject turbine system. Nuovo Pignone is an Italian company that designs and manufactures turbine systems. AGIP, USA is a United States company that serves as a procurement agent; it receives orders from foreign clients and procures the necessary parts and products from United States vendors. Cabinda Gulf Oil Company is an oil company operating, in all matters relevant to this action, off the coast of West Africa.

AGIP, USA placed an order for starter turbines with then Coppus Engineering Corporation ("Coppus") on behalf of Nuovo Pignone, located in Italy. Coppus delivered the starter turbines to AGIP, a delivery which included the subject starter turbine, in approximately July of 1974, and they were then apparently shipped to Nuovo Pignone in Italy by AGIP.

Nuovo Pignone entered into an agreement with Cabinda Gulf Oil Company ("CABGOC") for the sale of the subject turbine system. Nuovo Pignone then partially manufactured and assembled the turbine systems and shipped incomplete packages to Bayou Black, Louisiana for final manufacturing and assembly onto the gas injection platform. Nuovo Pignone provided personnel to assist in the installation of the turbine systems on the platform. After completion and assembly on the platform, the completed platform was shipped from Bayou Black, Louisiana to CABGOC in the Molongo Field in Cabinda, Angola, off the coast of West Africa.

Nancy G. Peré brought this action on October 17, 1994, on behalf of herself as the spouse of decedent and as the mother of their two children. Plaintiff filed suit against various entities for damages resulting from the death of Peré.[1] Plaintiff sued Nuovo Pignone, Inc. (an

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[1] Plaintiff's original Complaint filed in this Court seeks recovery under only the Death on the High Seas Act, 46 U.S.C. 761 et seq., and does not detail in any fashion the nature and involvement of the various defendants sued. However, plaintiff also filed suit against the same defendants in two United States District Courts for the Southern District of Texas – before Judge Kent of the Galveston Division and Judge Rosenthal of the Houston Division. Judge Kent dismissed the Galveston action without prejudice based upon the pendency of the Houston action. Judge Rosenthal dismissed the Houston action based upon the pendency of the action before this Court, however, Judge Rosenthal then later reinstated the Houston action and transferred it pursuant to 28 U.S.C. § 1404(a) to this Court. On June 14, 1995, this Court noted that the transferred Houston action and the action now before this Court were identical and ordered that the Houston action be closed and all documents filed in the action now pending before this Court. Therefore, the

Italian corporation also identified as Nuovo Pignone, S.p.A.) Pignone, Inc. (a United States corporation), and Coppus Engineering, Inc. (a United States corporation) as designers and manufacturers of the subject turbine system. Nuovo Pignone was 69% owned by Ente Nazionale Idrocaburi ("ENI") at the time of the explosion giving rise to plaintiff's cause of action. ENI is a joint stock company reporting to the Minister of Treasury in Italy.

Plaintiff also sued Tuthill Corp., as a successor corporation of Coppus Engineering. Plaintiff initially sued AGIP Petroleum Co., Inc., however, said company was voluntarily dismissed on August 9, 1995. Order granting plaintiff's Motion to Dismiss Defendant AGIP Petroleum Co., Inc. without prejudice (No. 18). Plaintiff then amended her Complaint to add as defendant AGIP, USA, Inc., on January 19, 1996. Second Amended Complaint (No. 27).

Analysis

Nuovo Pignone and the plaintiff have styled their FSIA-based motions as motions for summary judgment.

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complaints filed in this Court and in the Houston action have been consolidated. The Complaint brought in the Houston action listed several theories of recovery that are not present in the Complaint filed originally in this Court. In the Houston action, the plaintiff brought claims for strict products liability, negligence, gross negligence, violations of the Texas Deceptive Trade Practices Act, and for breach of express or implied warranties. There was no claim brought under the DOHSA. In addition, plaintiff provided much greater detail in the Houston action regarding the identity of the various defendants sued and the basis for plaintiff's claims against them.

However, Nuovo Pignone's motion is more properly brought as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Pro. 12(b)(1). Plaintiff's cross-motion for summary judgment in opposition to Nuovo Pignone's motion is more properly considered as an opposition to Nuovo Pignone's motion to dismiss.

Case law has established the respective burdens when a defendant claims immunity based upon the FSIA. The defendant. asserting immunity carries the burden of persuading the court that it is so entitled. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n. 6 (5th Cir. 1989) (*per curiam*). However, once the defendant makes a prima facie showing of entitlement to FSIA immunity, the plaintiff must then assume the burden of producing facts sufficient to show that an exception to immunity exists. *Id.; Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533 (5th Cir. 1992). The ultimate burden of proof on immunity remains at all times on the defendant. *Petroleos Mexicanos*, 962 F.2d at 533; *Forsythe*, 885 F.2d at 289 n. 6.

In determining whether a defendant is entitled to immunity, and thus whether the court retains subject matter jurisdiction over the plaintiff Is claims against the defendant, "a district court may rely not only on the pleadings; it may consider conflicting evidence – contained in affidavits, for example – and make its own resolution of disputed jurisdictional facts." *Forsythe*, 885 F.2d at 289 n. 6 (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)).

I. Nuovo Pignone's Status as a Foreign State

Congress passed the FSIA in 1976 as a codification of the "restrictive theory" of foreign sovereign immunity. *Stena Rederi A.B. v. Comision de Contratos*, 923 F.2d 380, 384-86 (5th Cir. 1991). Under the "restrictive theory," "a foreign state's immunity from suit in this country does not extend to acts that are private in nature, such as commercial activities, as opposed to those that are public in nature." *Coleman v. Alcolac, Inc.*, 888 F.Supp. 1388, 1399 (S.D. Tex. 1995) (citing *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983)). The FSIA provides when and how parties can bring actions against foreign states or their entities in the courts of the United States or the various States, and also provides when such foreign states are entitled to sovereign immunity. *Alcolac, Inc.*, 888 F.Supp. at 1399 (citing *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1064 (5th Cir.), *cert. denied*, 506 U.S. 867, 113 S.Ct. 193, 121 L.Ed.2d 136 (1992) (quoting H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & at Mem. News 6604 (1976))). The FSIA provides plaintiffs their sole basis for obtaining jurisdiction over foreign state defendants in both federal and state court. 28 U.S.C. § 1602.

The FSIA provides immunity only for "foreign states." 28 U.S.C. § 1602. The Act defines a "foreign state":

> (a) A "foreign state", except as used in § 1806 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in § 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603.

Nuovo Pignone contends that at the time of the accident in question, it was majority-owned by Ente Nazionale Idrocaburi ("ENI"). Nuovo Pignone further contends that ENI is an entity created by the Republic of Italy to lead Italy's endeavors in the fields of oil and gas exploration and development. Therefore, Nuovo Pignone contends that it was majority-owned by ENI, an agency or instrumentality of Italy, and that it is therefore a foreign state under the FSIA and entitled to immunity. It is undisputed that ENI is an agency or instrumentality of Italy.

Plaintiff contends Nuovo Pignone is not a foreign state under the FSIA. First, plaintiff argues that Nuovo Pignone has not carried its burden to establish that it was majority-owned by ENI at the time of the accident, and that therefore Nuovo Pignone cannot claim that it was owned by Italy at the time of the accident and therefore entitled to immunity.

Second, plaintiff contends that even if Nuovo Pignone has carried its burden to establish that it was owned by ENI at the time of the accident, Nuovo Pignone is still not entitled to immunity under the FSIA. Plaintiff contends that ENI is an agency or instrumentality of Italy, and not Italy or a political subdivision of Italy, and therefore Nuovo Pignone cannot qualify as an "agency or instrumentality of a foreign state" as a majority of its shares are not owned by a foreign state or political subdivision thereof. 28 U.S.C. § 1603(b).

Finally, plaintiff contends that the question is not whether Nuovo Pignone qualified as a foreign state at the time of the events giving rise to this action, but whether Nuovo Pignone qualified as a foreign state at the time plaintiff filed this action. Plaintiff contends Nuovo Pignone was owned by a consortium led by General Electric as of the time of filing of plaintiff Is action, and not by Italy or even an "agency or instrumentality" of Italy, and therefore cannot qualify as a foreign state.

Plaintiff's first argument is easily rejected. Nuovo Pignone has carried its burden to establish that it was majority-owned by ENI at the time of the events giving rise to this action. The explosion which forms the basis of plaintiff's claim occurred on October 16, 1993. Nuovo Pignone has produced uncontradicted evidence that it was majority-owned by ENI at least as late as December of 1993. Nuovo Pignone's Mem. in Supp., Exhibit A at 29 (No. 56). Nuovo Pignone has also produced evidence that before the sale of Nuovo Pignone stock to the private consortium led by General Electric, ENI owned 69% of

Nuovo Pignone's stock. *Id.*, Exhibit B at 46. Nuovo Pignone has produced evidence that its sale to the consortium led by General Electric was not officially announced until December 22, 1993, and that the contract was perhaps not final until May 24, 1994. *Id.* at 59-61. Nuovo Pignone has carried its burden to establish that it was majority-owned by ENI at the time of the events giving rise to plaintiff's action.

A. Tiering

A more difficult question is whether Nuovo Pignone, as an entity majority-owned by an agency or instrumentality of Italy ("ENI") and not Italy itself or a political subdivision thereof can be considered a foreign state under the FSIA. This problem of indirect ownership of entities by foreign states through intermediary "agencies or instrumentalities" has been referred to as one of "tiered" ownership. Plaintiff cites *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), in support of her argument that Nuovo Pignone cannot be considered an agency or instrumentality of Italy as Nuovo Pignone is not owned by Italy or a political subdivision thereof, but rather ENI, an agency or instrumentality of Italy.

In *Gates*, the Ninth Circuit considered whether Fletcher's Fine Foods ("FFF"), a pork processing plant headquartered in British Columbia, qualified as a foreign state under the FSIA. Alberta Pork Producers Development Corporation ("Alberta Pork"), found to be an agency or instrumentality of Canada, owned 100% of the shares of FFF.

The Ninth Circuit noted first that FFF, "an ordinary pork processing plant," could not be considered an "organ" of the province of Alberta. *Gates*, 54 F.3d at 1461. Therefore, FFF could only qualify for immunity under the FSIA if it was found to be an agency or instrumentality of the foreign state. To so qualify, the majority of FFF's shares would have to be owned by "a foreign state or political subdivision thereof." The Ninth Circuit then noted that FFF was wholly owned by Alberta Pork, that Alberta Pork was not a foreign state or political subdivision thereof, but rather an agency or instrumentality of a foreign state. *Id.* at 1462. The Ninth Circuit went on to state:

> One might argue that once we determine that Alberta Pork is an agency or instrumentality, then it ipso facto becomes a foreign state or political subdivision thereof. However, the literal language of the statute requires us to reject that argument. First, the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of § 1603, then it also would have intended a "political subdivision" to mean "a foreign state" because § 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." The statutory language strongly

> indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof."

Id. The Ninth Circuit quoted from the legislative history of the FSIA in support of its argument:

> The second criteria requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interest (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

Id. (quoting from the House Report, 1976 U.S.C.C.A.N. 6604, 6614). The Ninth Circuit stated that to find an entity owned by an agency or instrumentality of a foreign state to be an agency or instrumentality of a foreign state *itself* would be to impermissibly expand the extent of potential immunity beyond the intent of Congress in enacting the FSIA.

The Fifth Circuit has not addressed this issue. However, it can fairly be said that *Gates* is relatively isolated. The Seventh Circuit in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996), rejected the *Gates* construction:

> *Gates* concludes that the phrase "or political subdivision of" limits "foreign states" as used in § 1603(b)(2) to "foreign government." This conflicts with our construction of the FSIA in *Allen Dale Mut. Ins. Co. v. Bull Data Systems. Inc.*, 10 F.3d 425 (7th Cir. 1993), in which we considered whether two Zenith companies were "foreign states" under the FSIA. Each was 100% owned by another, single corporation, which in turn was 90% owned by France. We ruled that the two Zenith companies were "foreign states" under § 1603(b)(2) because "the Act's definition includes companies a majority of whose shares are owned by a foreign state." *Id.* at 427. *See also State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986) (State Bank of India a "foreign state" under FSIA because it was 92% owned by Reserve Bank of India, which is in turn owned by India), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987). . . . Our reading of the Act also comports with the construction other courts have given it in similar circumstances. *E.g. Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995) (corporation owned by another corporation in turn owned by political subdivision of foreign state is "instrumentality of a foreign state"); [*Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) (same)]. . . .

In re Air Crash Disaster, 96 F.3d at 941 (some citations omitted). In essence, the Seventh Circuit found the use of the word "includes" in § 1603(a) evinces Congress' intent to broadly define 'foreign state.' " *Id.* at 940.

> This is consistent with the statement in the legislative history that instrumentalities could assume "a variety of forms" (H Rep. at 6614), including "a transport organization such as

> [a]n . . . airline." Plaintiffs claim that the reference to "political subdivisions" in § 1603(b)(2) is rendered superfluous (or at least redundant) by the district court's construction. Even if so construed, it cannot alter our reading of the entirety of the FSIA, in which corporations with ATR's precise characteristics may be considered an agency or instrumentality of a foreign state.

In re Air Crash Disaster, 96 F.3d at 940-41.

The *Gates* court's statutory interpretation argument is strong and persuasive. *See Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.,* 896 F.Supp. 125, 130-31 (S.D.N.Y. 1995) (finding the *Gates* tiering argument persuasive, but finding no "foreign state" status on other grounds as well). It seems that the language of the FSIA, by defining an "agency or instrumentality" as an entity majority-owned by a "foreign state or political subdivision thereof," does not allow for finding an entity an "agency or instrumentality" if its shares are majority-owned by a "agency or instrumentality" of a foreign state, and not by a "foreign state or political subdivision thereof."

However, the weight of authority seems to be against this interpretation of the FSIA. District courts within the Fifth Circuit have found that entities indirectly owned by a foreign state are "agencies or instrumentalities" of foreign states. *See Delgado v. Shell Oil Co.,* 890 F.Supp. 1315, 1318 n. 5 (S.D. Tex. 1995); *Talbot v. Saipem A.G.,* 835 F.Supp. 352, 353 n. 2 (S.D. Tex. 1993). Moreover, it appears from the text of the FSIA as a whole and its legislative history that Congress intended entities whose shares are majority-owned by a foreign state to be considered

"agencies or instrumentalities" of the foreign state. To say an "agency or instrumentality" of a foreign state wholly owns another entity, and not the foreign state or one of its political subdivisions, does not necessarily lessen the foreign state's control of the latter entity. Rather, the foreign state still owns a majority of the shares of the latter entity, it simply does so through an intermediary. If this Court were confronted with a situation where an entity barely owned by a "foreign state or political subdivision thereof" itself has a bare majority interest in another entity, an entity which then claims status itself as an "agency or instrumentality," this Court's finding might differ. However, ENI is an entity created by Italy and reporting to the Minister of Treasury. ENI is 100% owned by the Minister of Treasury of the Republic of Italy. ENI had a 69% interest in Nuovo Pignone at the time of the incident giving rise to this action. Therefore, Italy majority-owned Nuovo Pignone, and Nuovo Pignone was an "agency or instrumentality" of Italy.

B. Timing

Plaintiff next argues Nuovo Pignone is not entitled to immunity as a "foreign state" under the FSIA because Nuovo Pignone was not majority-owned by Italy at the time of plaintiff's filing of suit.[2] It is undisputed that

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[2] Plaintiff also seems to argue that Nuovo Pignone has presented no evidence regarding its ownership at the time of the design and manufacture of the starter turbine in question. However, this Court easily dismisses that argument as plaintiff's claim is necessarily based upon the explosion off the coast of West Africa which resulted in the death of Peré, and not

Nuovo Pignone was owned by a private consortium led by General Electric at the time of plaintiff's filing. Plaintiff presents only one case in support of her argument. In *Straub v. A. P. Green, Inc.*, 38 F.2d 448 (9th Cir. 1994), the Ninth Circuit held "the FSIA applies when a party is a foreign state at the time the lawsuit is filed, even if that party was not a foreign state at the time of the alleged wrongdoing." *Id.* at 451. The Ninth Circuit did not hold the FSIA applies only if a party is a foreign state at the time the lawsuit is filed. Indeed, the Ninth Circuit noted its decision did not conflict with those of the only other circuits to address the issue.

> The Sixth and Eighth Circuits felt that the FSIA is applicable where a defendant is a foreign state at the time of the alleged wrong doing. *See General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988).

Straub, 38 F.3d at 451. *Straub* argues for a broader application of the FSIA, and not a narrowing of its application.

This Court is persuaded by the reasoning of the Eighth Circuit in *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir. 1993), in which the court noted the foreign policy concerns of the FSIA and the fact that these concerns do not necessarily dissipate once an entity leaves the control of the foreign state. Therefore, this Court concurs with the holdings of the Sixth and Eighth Circuits, and in the absence of any contrary authority, finds the time when the events occurred giving

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upon some hypothetical and unidentified time in the past when the starter turbine was designed or manufactured.

rise to this action is the time this Court should consider in determining whether the FSIA applies. As seen earlier, Nuovo Pignone was majority-owned by Italy at the time of the events giving rise to this action, and therefore the FSIA applies.

II. "Commercial Activities" Exception to Sovereign Immunity

Under the FSIA, Nuovo Pignone as a foreign state is immune from the jurisdiction of the courts of the United States. 28 U.S.C. § 1604. This Court may only exercise subject matter jurisdiction over Nuovo Pignone if an exception to sovereign immunity applies. *Id.* § 1330(a). *See Stena Rederi A.B. v. Comision de Contratos,* 923 F.2d 380, 386 (5th Cir. 1991). One of the exceptions to sovereign immunity recognized by the FSIA is "a broad 'commercial activities' exception: Foreign sovereigns are not immune from judicial process in any case in which the action is based upon commercial activity that has a jurisdictional nexus with the United States. [28 U.S.C. § 1605(a)(2)]." *Stena Rederi,* 923 F.2d at 386. The Fifth Circuit has emphasized that the sovereign's commercial activity must have "a sufficient connection – a 'jurisdictional nexus' – with the United States." *Id.* The FSIA identifies three commercial acts sufficiently connected to the United States to satisfy the jurisdictional nexus requirement:

> (1) A commercial activity carried on in the United States;

> (2) An act performed in the United States in connection with a commercial activity carried on outside the United States; and
>
> (3) A commercial activity carried on outside the United States that has a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

A foreign sovereign's commercial activity in the United States is not enough to remove that sovereign's immunity under the commercial activities exception. There must be a material connection between the plaintiff's cause of action and the defendant sovereign's commercial acts in the United States.

> A foreign sovereign, however, does not abrogate its sovereign immunity simply because it conducts commercial operations that have a connection with the United States. Not only must there be a jurisdictional nexus between the United States and the commercial acts of a foreign sovereign, there must be a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign. . . . In order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based.
>
> The requirement under the FSIA of a connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign is a significant barrier to the exercise of subject matter jurisdiction in United States courts. We do not suggest that the commercial activities exception requires a direct causal connection. . . .

> Nonetheless, the connection between the cause of action and the sovereign's commercial acts in the United States must be material. Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity.

Stena Rederi, 923 F.2d at 386-87 (citations omitted).

In the instant case, Nuovo Pignone does not dispute that it carries on commercial activity in the United States. The commercial activity related to the plaintiff's cause of action against Nuovo Pignone is the design and manufacture of turbine systems for mineral production. Nuovo Pignone does dispute that any of its commercial activities in the United States concerned the design and manufacture of the subject turbine system. This is a commercial activity routinely engaged in by private companies throughout the world. A " 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). This Court is satisfied that Nuovo Pignone's alleged design and manufacture of gas turbine systems is a commercial activity as defined by the FSIA.

What remains to be decided is whether Nuovo Pignone engaged in the commercial activity of designing and manufacturing gas turbine systems in the United States, and whether there is a material connection between this commercial activity and the plaintiff's cause of action.

The plaintiff presents evidence that the gas turbine system on which Peré was working when the explosion occurred was shipped from Italy to Bayou Black, Louisiana for final assembly before being shipped to West Africa. Plaintiff's Mem. in Opp., Exhibit J at 40-46 (No. 59). In addition, Nuovo Pignone sent a representative to Louisiana to supervise or consult in the assembly of the component parts of the turbine system onto a platform. *Id.* at 82-83. While this Court cannot know that Nuovo Pignone's commercial activity in Louisiana regarding the turbine system has a direct causal connection to the explosion of the turbine system that forms the basis of plaintiff's action, this Court *is* convinced there is a material connection between the plaintiff's cause of action and Nuovo Pignone's commercial acts regarding the subject turbine system in the United States. This Court finds the commercial activity exception applies and Nuovo Pignone is thus not immune from judicial process in this action.

Conclusion

Nuovo Pignone is a foreign state for purposes of this action, however, it engaged in commercial activity in the United States materially connected to the plaintiff's cause of action, and it is therefore not entitled to immunity under the FSIA. Nuovo Pignone's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Summary Judgment upon the FSIA immunity is in reality an opposition to Nuovo Pignone's motion, and not properly a Motion for Summary Judgment, and is therefore DENIED as well.

THUS DONE AND SIGNED this 29 day of April, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

NANCY G. PERÉ, ET UX	CIVIL ACTION NUMBER: 94-1889
VERSUS	
NUOVO PIGNONE, INC., ET AL	JUDGE DOHERTY
	MAGISTRATE JUDGE METHVIN

ORDER

(Filed Apr. 30, 1997)

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Nuovo Pignone's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Summary Judgment upon the FSIA immunity is in reality an opposition to Nuovo Pignone's motion, and not properly a Motion for Summary Judgment, and is therefore DENIED as well.

Lafayette, Louisiana this 29 day of April, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERE', Individually and on behalf of her minor children, MATTHEW REED PERE' and MARCI DANIELLE PERE'	**Civil Action No:CV94-1889** **Division: L-O**
versus	**Judge Rebecca F. Doherty**
NUOVO, PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY	**Magistrate Judge Methvin**

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ORDER

(Filed Sep. 21, 1998)

Considering the Motion for Entry of Judgment on behalf of Nuovo Pignone, S.p.A.:

IT IS ORDERED AND ADJUDGED that all claims of plaintiffs and all claims of cross-claimants against Nuovo Pignone, S.p.A. are hereby dismissed with prejudice. The Clerk is instructed to enter a Judgment dismissing the action as to defendant. Nuovo Pignone, S.p.A.

Lafayette, Louisiana, this 21 day of Sept, 1998.

/s/ Rebecca F. Doherty
Judge Rebecca F. Doherty

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NANCY G. PERE', individually and on behalf of her minor children, MATTHEW REED PERE' and MARCI DANIELLE PERE'	CIVIL ACTION NUMBER: H 94 3550 JURY
VERSUS	COMPLAINT
NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY	JUDGE MAGISTRATE

****

COMPLAINT FOR DAMAGES

(Filed Oct. 19, 1994)

The complaint of **NANCY G. PERE'**, a person of the full age of majority and a domiciliary of Vermilion Parish, Louisiana, who brings this suit individually, and on behalf of her minor children, **MATTHEW REED PERE'** and **MARCI DANIELLE PERE' (Petitioners)** respectfully avers the following:

JURISDICTION

1.

This court is vested with jurisdiction over this matter pursuant to 28 USC 1332 since there exists complete diversity between the parties. The matter in controversy exceeds $50,000.00.

VENUE

2.

This proper venue for this action if [sic] the United States District Court for the Southern District of Texas, Houston Division, in accordance with 28 USC 1391.

PARTIES

3.

Made Defendants are:

a) **NUOVO PIGNONE, INC., a foreign corporation doing business in the State of Texas as PIGNONE, INC., who is subject to the jurisdiction of this court under the Texas Long Arm Statute;**

b) **PIGNONE, INC., a New York corporation doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;**

c) **COPPUS ENGINEERING, a foreign corporation doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;**

d) TUTHILL CORPORATION, A Massachusetts corporation, as the successor corporation of COPPUS ENGINEERING, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;

e) AGIP PETROLEUM COMPANY, INC., a foreign corporation doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;

f) ABC INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, WHO IS SUBJECT TO THE JURISDICTION OF THIS COURT UNDER THE TEXAS LONG ARM STATUTE;

g) DEF INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute;

h) GHI INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute;

i) JKL INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute; and

i) **MNO INSURANCE COMPANY, a foreign or domestic insurance company licensed to do and doing business within the State of Texas, who is subject to the jurisdiction of this court under the Texas Long Arm Statute.**

All of the aforementioned Defendants are liable jointly, severally and insolido for the damages occasioned by the Petitioners.

FACTS

4.

Marcus Daniel Pere´ (Pere) was a resident and domiciliary of Abbeville, Vermilion Parish, Louisiana.

5.

Petitioners' husband and father, Marcus Daniel Pere´ began his employment with Chevron Oil Company (Chevron) on March 7, 1979.

6.

On or about October 16, 1993, Marcus Daniel Pere´ was employed by Cabinda Gulf Oil Company (COPI), a division of Chevron, as an instrument technician in the Malongo maintenance department.

7.

Pere´ was in the course and scope of his employment off the coast of Cabinda, Angola, West Africa on October 16, 1993.

8.

On the morning of October 16, 1993, PERE´ was dispatched to the Gas Injection Platform Fox (GIP-FOX), located approximately 7-10 miles off the coast of Cabinda, Angola, Africa, to administer testing procedures on a gas turbine system. While performing these procedures with a co-employee, Clark Toups, an explosion occurred killing Marcus D. Pere´.

FIRST CAUSE OF ACTION:
STRICT PRODUCTS LIABILITY

9.

The gas turbine system (FC-1C) and its component parts, which are the subject of this suit, were designed, constructed, assembled, manufactured and modified by NUOVO PIGNONE, INC., PIGNONE, INC. and COPPUS ENGINEERING, INC. This turbine and its component parts were defective, unsafe, and inadequate. In the following manner:

1. The design of the turbine system was defective in that it posed the propensity to explode;

2. defendants' failed to adequately warn users of the hazardous propensities which allowed for the turbine to explode;

3. the turbine system described above, had it been properly designed, manufactured and modified, would not ordinarily be inherently dangerous; however, because of its defective design and construction, the turbine system was dangerous to life and limb of MARCUS DANIEL PERE´, who was unaware of its dangers, hazards and perils;

4. the composition of the turbine blades were defectively designed, manufactured and modified;

5. the starter turbine was defectively designed, manufactured, modified and improperly combined with natural gas turbine system (FC-1C); and

6. such other defects as may be identified during further investigation and discovery.

The Defendants' introduced the turbine system into the stream of commerce by selling them to consumers all over the world. The turbine system and its component parts were defectively designed. The design defect rendered the turbine system and its components parts unreasonably dangerous for use by consumers. The defectively designed turbine system and its component parts were producing cause of the damages suffered by the Petitioners.

SECOND CAUSE OF ACTION: NEGLIGENCE

10.

PIGNONE, INC., its parent corporation, NUOVO PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, and AGIP PETROLEUM

COMPANY, INC., are in the business of providing turbine systems for the public. PIGNONE, INC., its parent corporation, NUOVO PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, and AGIP PETROLEUM COMPANY were negligent in designing, manufacturing, modifying, and/or marketing the FC-1C turbine system in question. Specifically, Defendants' designed, manufactured, modified, and/or marketed the turbine system in question without proper regard for the safety of users of the product and members of the public present during their usage specifically, MARCUS DANIEL PERE'. The death of PERE' and the injuries to the Petitioners were proximately caused by the negligence of PIGNONE, INC., NUOVO PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, and AGIP PETROLEUM COMPANY and their insurers, agents, servants, and/or employees, including but not limited to the following acts or omissions:

1. The design of the turbine system was defective in that it posed the propensity to explode;

2. defendants failed to adequately warn users of the hazardous propensities which allowed for the turbine to explode;

3. the turbine system described above, had it been properly designed, manufactured, and modified, would not ordinarily be inherently dangerous however, because of its defective design and construction, the turbine system was dangerous to life and limb of MARCUS DANIEL PERE', who was unaware of its dangers, hazards and perils;

4. the composition of the turbine blades were defectively designed, manufactured and modified;

5. the starter turbine was defectively designed, manufactured, modified and improperly combined with the natural gas turbine system (FC-1C); and

6. such other defects as may be identified during further investigation and discovery.

7. failed to otherwise exercise due care with respect to designing, manufacturing, assembling, customizing and/or modifying and distributing the turbine system in this action; and

8. such other acts of negligence as may be identified during further investigation.

Such negligence by the Defendants' was the proximate cause of the damages sustained by the Petitioners.

GROSS NEGLIGENCE

11.

Additionally, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees were grossly negligent in designing, manufacturing, modifying and/or customizing and marketing the turbine system made the basis of this suit. By designing, manufacturing, modifying and/or customizing and marketing the turbine system without

proper regard for the safety of users of the turbine systems and those present during its usage, the Defendants displayed such an entire want of care that the design, manufacture, modification, and/or customization and marketing of the turbine system was a result of the conscious indifference to the rights, safety or welfare of MARCUS DANIEL PERE´. Such gross negligence was a proximate cause of the death of MARCUS DANIEL PERE´ and the damages suffered by the Petitioners, pursuant to the provisions of Chapter 41 of the Texas Civil Practice & Remedies Code, the Defendants are liable to the Petitioner for the exemplary damages.

VIOLATIONS OF TEXAS DECEPTIVE TRADE PRACTICES ACT (D.T.P.A.)

12.

In addition to the above stated grounds of liability, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees also violated the Texas Deceptive Trade Practices – Consumer Protection Act, Article 17.14 et. seq. of the Texas Business and Commerce Code. Specifically, the Defendants engaged in the following false, misleading or deceptive acts or practices:

> § 17.46(b)(5): representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have;

§ 17.46(b)(7): representing that goods or services are of a particular standard, quality or grade, or that goods are of the particular style or model, if they are of another;

§ 17.46(b)(9): advertising goods or services with intent not to sell them as advertised;

§ 17.46(b)(23): the failure to disclose the information concerning goods or services which as known as the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

Each of the foregoing false, misleading, or deceptive acts was a producing cause of damages suffered by the Petitioners. The Defendants' conduct in the design and manufacturing in the sale of the turbine system in questions [sic] was a producing cause of PERE's death. Therefore, since the Defendants' conduct was "knowing", the Petitioners are entitled to treble damages under the Act, in addition to attorney's fees and costs.

BREACH OF EXPRESS OR IMPLIED WARRANTIES

13.

The Petitioners incorporate each and every allegation contained in the paragraphs above as though again fully set forth.

By engaging in the business of designing, manufacturing, distributing, modifying and/or customizing, marketing, selling and supplying the turbine system, the Defendants, NUOVO PIGNONE, INC., PIGNONE, INC.,

COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees expressly and impliedly warranted that such products were free of defects, were of merchantable quality, were suitable for the purpose for which they were fabricated, manufactured, modified, and/or customized and sold, and were safe for use for their intended purpose. The defective condition of the turbine system constituted a breach of the express and implied warranties of merchantability, fitness and suitability for the purpose for which they were sold. This breach of express and implied warranties was a proximate cause of the death of MARCUS DANIEL PERE.

14.

In addition, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees knew, or in the exercise of reasonable care, should have known that the turbine system was a dangerous instrumentality if not properly designed, manufactured, tested, inspected, modified and/or customized and that the turbine system presented the probability of harm to any users and others unless it was free from defects. As a result. the aforementioned

Defendants had a duty to foreseeable users and to MARCUS DANIEL PERE´ in particular to:

1. Inspect the turbine system that it sold and placed in commerce to determine whether it would be reasonable [sic] fit for its intended uses before exposing the public to his unnecessary risk; and

2. Warn or give fair and adequate notice to the inherently dangerous condition existing as a result of the negligent design, manufacture and modification/customization of the turbine system and all mechanism pertaining thereto.

NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, INC., TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, and MNO INSURANCE COMPANY and their agents, servants, and/or employees breached this duty in that they negligently and carelessly failed to warn MARCUS DANIEL PERE´ of the inherently dangerous condition of the turbine system, and failed to inspect or test the same to determine whether it was reasonably fit for the intended use.

DAMAGES

15.

Upon the trial of this case, it will be shown that MARCUS DANIEL PERE´ died as a result of Defendants' negligence. The Petitioners respectfully requests [sic] that Court and Jury to determine the amount of losses that

NANCY G. PERE', individually and on behalf of her minor children, MATTHEW REED PERE' and MARCI DANIELLE PERE' suffered as a result of the death of MARCUS DANIEL PERE'. There are certain elements of damages provided by law that the Petitioners are entitled to have the Jury in this case separately consider to determine the sum of money for each element that will fairly and reasonably compensate the Petitioners for the injuries, damages and losses incurred in the past and to be incurred in the future, since the date of the accident. The elements of damages to be considered separately and individually for the purpose of determining the sum of money that will fairly and reasonably compensate the Petitioners for each element are as follows:

1. The loss of counsel, training, support and advice;
2. mental anguish;
3. loss of society;
4. loss of consortium; and
5. other damages to be proven at trial.

Additionally, Petitioners are entitled to recover exemplary damages for the gross negligence of the Defendants. Petitioners are also entitled to recover reasonable and necessary attorney's fees and court costs pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act.

Because of all of the above and foregoing, Petitioners have been [sic] damages and will be damages in the amount in excess of the minimum jurisdictional limits of this Court, for which Petitioners now brings [sic] suit.

16.

Petitioners demand a trial by Jury on all issues.

WHEREFORE, Petitioners pray that the Defendants be duly cited to appear and answer this complaint, and that Defendants, NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY, be served in accordance with the Texas Long Arm Statute with a copy of the same in accordance with law and that after all legal delays and proceedings are had, that there be judgment rendered herein and in favor of the Petitioners, ordering NUOVO PIGNONE, INC., PIGNONE, INC., COPPUS ENGINEERING, TUTHILL CORPORATION, AGIP PETROLEUM COMPANY, INC., ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY, MNO INSURANCE COMPANY, to pay unto Petitioners actual damages which are reasonable and equitable in the premises, including exemplary damages, for the gross negligence of the Defendants, together with all costs and disbursements in this action with post-judgment and prejudgment interest until paid to the fullest extent allowed by law. Petitioners are entitled to recover exemplary damages for the gross negligence of the Defendants. Petitioners are also entitled to recover reasonable and necessary attorney's fees and court costs pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act

as well as such other relief to which the law and equity entitles the Petitioners.

Respectfully submitted,

SONNIER & TRAHAN

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ATTORNEY FOR THE PETITIONERS

APPENDIX E

AGREEMENT NO. 133

WHEREAS, Operator is engaged in oil and gas exploration and development drilling operations and is in need of certain material, equipment, and services in connection therewith; and

WHEREAS, Contractor represents that it is qualified to furnish the aforementioned material, equipment, and services, and is desirous of providing the same on the terms and conditions set forth below;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, operator and Contractor do hereby agree as follows:

* * *

.05 Comply with all applicable U.S. or foreign laws, rules, regulations, or decrees, including the U.S. Foreign Corrupt Practices Act, and any amendments to any of the same which are now or may in the future become applicable to Contractor in connection with this Agreement or the performance hereof.

* * *

.11 Warrant and guarantee that all items of equipment and all component parts thereof, and all materials furnished to Operator as part of Contractor's performance of this Agreement shall be free of defects in materials and workmanship; shall conform in all respects to the descriptions, specifications, and drawings, if any, contained in this Agreement, or in any Schedule or Attachment made a part hereof, or in any other document, if any, specifically incorporated herein by reference, and shall function and perform as specified. This warranty is in addition to,

and not in lieu of, the implied warranties of merchantability and fitness for a particular purpose of the Uniform Commercial Code of the State of Texas or of any State of the U.S. having jurisdiction hereof. For purposes of the warranties and other statutory matters provided for in the said Uniform Commercial Code the Parties contemplate, agree and understand that that portion of Contractor's performance hereunder involving the furnishing of equipment and/or materials shall be deemed a sale of goods. The warranty remedies mentioned in this subsection are in addition to, and not in substitution of, any other remedies to which operator might be entitled by virtue of any other provision(s) of this Agreement, or under applicable law.

* * *

.04 To indemnify operator, and its directors, officers, and employees, and hold the same harmless from all loss or damage resulting from charges, claims, demands, liens, suits, causes of action, arbitration, or other form of litigation and the cost of the same, including legal fees and the cost of settlement, alleging injury to, or death of, or damage to any property, or derogation of the legal interest of any person, including Contractor's employees, when such claim for loss or damage is asserted against Operator or operator's directors, officers, employees, agents, or contractors, in connection with the performance by Contractor of, or failure properly to perform, this Agreement during the execution of the service work in Angola. This indemnity shall be in effect with respect to loss or damage arising from, or alleged to arise from Contractor's actions. This indemnity shall be effective regardless of the legal theory on which such loss or damage is predicated, or the particular form of remedy sought or claimed. If this Agreement

is governed by Texas law, this indemnity provision adopts, and incorporates by reference, the exceptions to the limiting provisions of Texas Civil Statute, Article 2212(b) contained in said Article 2212(b)(4).

* * *

18. ARBITRATION. Any dispute, controversy, or difference between the Parties arising out of, or relating to, this Agreement which cannot be settled by mutual agreement shall be finally determined by arbitration in Zurich, Switzerland under the rules of the International Chamber of Commerce by a three-member arbitration panel appointed in accordance with the rules of the said International Chamber of Commerce. The arbitration award shall be final and binding on the Parties. Judgment upon the award may be entered pursuant to any treaty or convention, or international, or competent national or local basis of jurisdiction in any court or tribunal, for judicial acceptance or an order of enforcement, as the case may be.

19. GOVERNING LAW. Questions concerning the performance or execution of this Agreement shall be governed by the laws of The State of Texas, U.S.A.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

****

DEPOSITION OF SENIO PECCHI

(10-16-96)

* * *

[p. 23] Q Nuovo Pignone SpA?

A Yes.

Q And after 1994, in what capacity did you serve Nuovo Pignone SpA?

A Well, because I was involved in the privatization of Pignone, I continued to develop the similar activity, but for a more limited area that was in MEACE. That means Middle East, Africa, Central Europe.

Q Okay. All right. And that is what you've been doing since 1994?

A This was since the begin of 1994.

Q And do you serve in that capacity today?

A Today, no. Up until the end of June, because now I am retired.

Q Oh, okay. All right.

A The end of June.

Q A smart man.

All right. Let's go back to your marketing from 1985, on – Well, strike that.

Let's go back from 1979 until 1985. Did Nuovo Pignone SpA advertise its products, to the best of your knowledge, in any trade journals within the United States?

A Our advertising was made only in technical magazines [p. 24] that were distributed all over the world.

Q And were those periodicals or journals distributed in the United States?

A Yes, of course.

MR. CANTER:

Were those described distributed in the United States or distributed to the United States from Italy?

THE WITNESS:

Well, no. These are well-known technical magazines that are distributed all over the world and sometimes are published in the United States or published elsewhere.

BY MR. TRAHAN:

Q So your advertisements ran in these technical journals?

A Yes.

Q Nuovo Pignone SpA would purchase an advertisement in that journal?

A Yes of course.

Q And some of those journals were generated in the United States?

A Yes.

Q And this was from 1979 through 1985?

A This is also the common practice.

[p. 25] Q All right. And that was my next question. You jumped ahead of me, Doctor.

Has the customary practice, as far as Nuovo Pignone SpA's advertising practices, changed any since you became familiar with them in 1979?

A I would like to understand better, your question.

Q All right. And it was a very long question.

Has the practice – Nuovo Pignone SpA's practice of advertising in these technical journals, changed at all since 1979?

A No. It's the same as we've performed in the past.

Q Were there any other forms of advertisement besides the technical journals, that Nuovo Pignone utilized to showcase their products?

A Our advertising is mainly done in technical magazines.

Q Do you recall any of the names of these technical magazines?

A Yes, of course. "Hydrocarbon Processing."

Q "Hydrocarbon Processing"?

MR. CANTER:

It's on my coffee table.

MR. TRAHAN:

I'm going to get my subscription tomorrow.

BY MR. TRAHAN:

[p. 26] Q Any others?

A A "Oil and Gas Journal," "Chemical Engineering."

MR. DAIGLE:

Oh, I have that one in the men's room.

THE WITNESS:

"Oil and Gas Process," "Gas Turbine Journal," and some Italian technical magazines.

BY MR. TRAHAN:

Q Now, the ones you named earlier, "Hydrocarbon Processing," "Oil and Gas Journal," "Oil and Gas Process," and "Gas Turbine Journal," are those all United States technical journals?

A Not necessarily United States. I mean, they have a very large diffusion all over the world.

Q But are they published by an American publisher?

A According to my knowledge, not necessarily. The editor is in the U.S. But sometimes they are translated in another language and published outside of the United States.

Q Okay. But does the original publication – is it generated in the United States?

A Yes, I think so.

Q Okay. All right. Some forms may be translated into other languages and distributed around the world, but the origin of it is the United States?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

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DEPOSITION OF CARLO BRESCI

(10-16-96)

* * *

[p. 40] A It began on March 1st, for 12 months duration.

Q Okay.

A No, 18 months duration.

Q Okay. From March 1st of '93 –

A Up until September, '94.

Q Okay. Doctor, let's go back and let's leave these agreements alone for a minute, and let's talk about your service to the company as a sales representative.

Did you or any of your employees in the sales division solicit business in the United States?

A I did not understand. Sorry.

Q Okay. While you were representing Nuovo Pignone in the sales department or sales division for component parts –

A Parts and services.

Q did you or anyone under your supervision solicit business in the United States?

A Yes. We have one person that actually visits the American users in the States.

Q Who is that individual?

A The individual is Mr. Lighetti.

Q Spell that for me, please.

A L-I-G-H-E-T-T-I.

Q And he's employed by Nuovo Pignone, SpA?

[p. 41] A Yes, he is.

Q And he was employed in that capacity when you served in the sales of component parts or in the sale –

A No. He doesn't sell. He acts as a facilitator of this, visiting users, looking at their needs and keeping in touch with headquarters and soliciting quotations providing the right personnel. He asks for the right personnel for a venture.

Q Does he live in the United States?

A He lives in Houston.

Q And, if I understand you correctly, Doctor, his function was to visit various potential users of your equipment?

A Not potential – Users. Because to send parts, they are users.

Q Was anyone else besides this gentleman that you named – Did anyone else besides this gentleman that you named serve in that capacity while you were with the sales division?

A I don't understand. Sorry.

Q You named a gentleman just now –

A Yes.

Q – who visited various users of your equipment.

A Uh-huh (affirmative response).

Q Correct? Was there anyone else besides that

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
	*	NO. CV94-1889
VERSUS	*	
	*	JUDGE REBECCA
NUOVO PIGNONE,	*	DOHERTY
ET AL	*	MAGISTRATE JUDGE
	*	METHVIN
	*	

****

DEPOSITION OF RAFFAELLO GUSSO

(11-6-96)

* * *

[p. 14] A Yes.

MR. CANTER:

Just for the Record, it's marked "Exhibit 24."

BY MR. TRAHAN:

Q Did you participate in the negotiation of Agreement No. 133?

A Only from a technical point of view, yes.

Q And when you say, "from a technical point of view," describe your involvement in the negotiation.

A Yeah. Since the beginning of the negotiation, I was especially involved in the selection of the gas turbine and the centrifugal compressor from a technical point of view to comply with the requirements for the customer.

Q Did you – The technical aspect that you have testified that you negotiated, who was the other party negotiating with you?

A Mr. Donovan of Gulf Oil.

Q And how did those negotiations take place?

A There were several meetings. One – The first one, in Florence, in August of '83. The second one, in Houston, in October of '83. And all the others, in Florence. The most important one was in March, '84, during which we put – defined the supply carefully, [p. 15] both from a technical point of view and a commercial point of view.

Q Altogether, Mr. Gusso – Now, did you participate in all of these negotiations?

A Yes.

Q Okay. Were there other negotiations between – To the best of your knowledge, were there other negotiations between Nuovo Pignone SpA and Gulf Oil that may have transpired either in Florence or Houston that you did not participate in?

MR. CANTER:

Objection, but you can answer it.

THE WITNESS:

As for as I know, no.

BY MR. TRAHAN:

Q So it's your belief that you participated in all of the negotiations between or all of the negotiation meetings between Gulf Oil and Nuovo Pignone SpA?

A Yes. At least the most important ones.

Q All right. What, generally, was the – as you understand it and are sitting here today, what was your understanding of the obligations of Nuovo Pignone SpA as to Agreement No. 133?

A The obligations were to supply three sets of gas turbines, plus one spare and to replace a previous [p. 16] type of the same gas turbine.

The first one was called MS1002-B, "B" for "Boston." And the upgraded type was 1002-"D" for "Denver." This had the possibility of operating the unit from 5200 horsepower to 6400 horsepower and allowed the customer to have a higher flow through the compressors – the driving compressors. Also, the driving compressors had to be replaced, as far as the internal bundles were concerned; not the casings.

Q My understanding also, after reviewing the contract, is this was designated as a reconfiguration agreement.

A Yes. It was an upgrade, actually, of the three units of the FOX platform.

Q So the entire – in a layman's sense, Mr. Gusso, the FOX platform underwent a major overhaul?

A Yes.

Q Now, under the terms of this agreement, what is your understanding of what Cabinda Gulf Oil's responsibilities were?

A Gulf, as far as I can remember, made the company with the Government of Angola, if I could remember, Sonangol. And the company name was CABGOC. And that was our – how can you say – operator and the [p. 17] second part of the agreement, the counterpart of the signed agreement. And they had the responsibility for all of the units installed in the platforms and also the operation and maintenance of these units.

Q Okay. But under the terms of Agreement No. 133, as I read it, my understanding is you would provide all of the parts, services and replacements for these turbines, and their obligation was to pay you to do that?

A Right.

Q So that is an accurate summary of the agreement, as far as the obligations of the parties?

A Sure.

Q Okay. All right. Now, under the terms, there are different provisions in this contract, Mr. Gusso, that I'm sure you're familiar with. And one of which is a possible cancellation provision. Do you know whether or not at anytime, whether this reconfiguration agreement, Agreement No. 133, was canceled?

A I don't know. But I don't think so.

Q Okay. Do you recall the consideration of the price that Cabinda Gulf Oil was to pay to Nuovo Pignone for Nuovo Pignone SpA's satisfaction of their obligation under this contract?

[p. 18] A Yes.

Q How much was it?

A 3.2 million dollars.

Q And that's in U.S. dollars?

A Yes.

Q Okay. And after reviewing the contract, it appeared that the 3.2 million dollar consideration or price was solely for the parts and materials. Is that description inaccurate, and was there an additional charge for the services rendered by Nuovo Pignone SpA employees?

A Yes, there would be an additional contract or agreement for the services of our people over there.

Q There's a separate agreement aside from this No. 133 for personnel?

A I never saw it.

Q Okay. So you don't know if it exists?

A Yes.

Q Okay. But am I correct in summarizing the agreement in that, the obligations of Nuovo Pignone SpA under this agreement, Agreement No. 133, would have furnished materials, equipment and personnel to reconfigure the G-FOX platform?

MR. CANTER:

Objection as to form. The agreement speaks

* * *

[p. 40] case?

A Yes.

Q All right. Let's turn to "Schedule G," Dr. Gusso. And I'm going to ask you if you can identify what "Schedule G" is.

A Yes.

Q What is it?

A Well, it probably is an effort to better identify the type of supply that are revisions of the agreement – of the content of the agreement.

Q So it is a more – would it be fair for me to describe this schedule as a more accurate and specific representation of the work to be performed and materials to be provided by Nuovo Pignone SpA?

A From some aspects, yes.

Q Okay. All right. Now, I have highlighted, at the top of that document, Doctor, I think that FC-1C. Does that designation mean anything to you, or can you tell me what it represents?

A If I can remember, FC-1A, 1B and 1C are the three trains – turbocompressor trains that had to be upgraded.

Q Upgraded, okay. So these are the three compressor trains that underwent reconfiguration?

A Right.

* * *

[p. 75] Thank you. That's all of the questions that I have.

MR. TRAHAN:

I have a few follow-ups, in light of the last set.

Doctor, would you retain that document, please?

BY MR. TRAHAN:

Q For the reconfiguration to be effective, would it be a fair assessment for me to say that you had to take into account the accessories or other components of the FC-1C train?

A They remained exactly as they were. The only modification occurred in the inlet duct and the expansion joint.

Q But the specifications of those accessories would be valuable information in determining the ramifications or the specifics of the reconfiguration of the turbines?

A They were only checked from an engineering point of view, if they were sufficient and in agreement with the new parts that were put in the gas turbine and in the compressors. And they were found right, because they add sufficient margin to satisfy the requirements of both machines.

[p. 76] Q So certainly, before the reconfiguration process began, Nuovo Pignone SpA had to determine whether the other components of the skid were compatible with the items to be installed?

A Yes, of course. As usual, we do.

Q So, in effect, the entire skid and its accessories had to be reviewed to determine whether the accessories were compatible with the proposed reconfiguration?

A Yes.

Q So the physical modifications may have only been to the portions highlighted by Mr. Daigle?

A Yes.

Q But the entire skid was evaluated?

A Was checked.

MR. TRAHAN:

I think that's all I have.

Jim, do you have any?

MR. DILL:

No, I don't.

MR. DAIGLE:

Sam?

MR. MASUR:

No questions.

(Whereupon, the Deposition was concluded at 11:45

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

****

DEPOSITION OF MARCO CIONCOLINI

(6-6-96)

* * *

[p. 30] A Yes.

Q Okay.

MR. CANTER:

What page are you on?

MR. TRAHAN:

The Doctor indicates that the price is located on page 31.

MR. CANTER:

What exhibit is it?

THE WITNESS:

Thirty-one.

MR. TRAHAN:

Nineteen.

CONTINUATION OF EXAMINATION BY MR. TRAHAN:

Q What was the price, Doctor?

A The price is $21,140,482.

Q And that was the total price for the entire project which Nuovo Pignone was contracted to perform on?

A It was the price of this contract.

Q The price of just this contract?

A Yes.

Q Correct. Now, Doctor, on page 3 of the contract, under equipment specifications 1.1, subsection B, and I have a star by it, Doctor.

MR. CANTER:

* * *

[p. 40] A This document is a commercial invoice.

Q Okay. And who's it to?

A It's to Sonangol and CABCOC, care of Cabinda Gulf Oil Company in Luanda.

Q Okay. And what other information is reflected on that invoice, Doctor?

A There is the designation of the goods shipped.

Q Okay. Does it indicate where the goods were shipped?

A No, I don't see the shipment date here.

Q Doctor, do you know where these turbine compressor systems were shipped to?

A I am not able to identify that from this document.

Q But outside of this document, do you have personal knowledge as to whether these compressors – for lack of a better term, turbine and compressor systems shipped to?

MR. DAIGLE:

Excuse me. Let's go off the record a minute.

(Whereupon, a brief off-the-record discussion was had by Counsel.)

THE WITNESS:

You're asking the date?

MR. TRAHAN:

[P. 41] No. No. Just where.

CONTINUATION OF EXAMINATION BY MR. TRAHAN:

Q Doctor, do you know where the document, I mean, the compressor and turbine system shipped to?

A Shipped to Louisiana.

Q And what was the purpose for them being shipped to Louisiana?

A In Louisiana there was the building of the deck of the platform.

Q Doctor – Okay. I'm sorry. Continue.

A The turbine has to be put on the deck for final shipment to Luanda.

Q I reviewed several of the purchase – the shipping documents that were produced by Chevron. It appears, Doctor, from those documents – And I want you to correct me if I'm wrong – that Nuovo Pignone packed those turbines and compressors?

A Yes. Nuovo Pignone packed them.

Q Nuovo Pignone?

A Nuovo Pignone.

Q Were those items – And when I say "items," I'm talking about compressors and turbines. It appeared from the documents that compressors were packed in a crate and the turbines were packed in a separate crate; is that accurate?

* * *

[p. 82] CONTINUATION OF EXAMINATION BY MR. DILL:

Q This particular one, yes. I'm very specific here.

A I told before that in this case, several components had been shipped individually – gas turbine, compressors, ducting, electric panels for each individual gas turbine compressor tank.

Q Were you involved with the Cabinda Gulf Oil project when those components were shipped to the United States?

A Yes. I was in the position –

MR. CANTER:

Next question.

CONTINUATION OF EXAMINATION BY MR. DILL:

Q What was your position?

A I was Manager of gas turbine and compressor sales.

Q Did you send or did Nuovo Pignone S.p.A. send a representative of Nuovo Pignone S.p.A. to Louisiana to supervise or consult in the assembly of the component parts onto the platform?

A I think, yes.

Q Do you know how long that representative or those representatives stayed in Louisiana?

A I don't know the time.

Q Do you know how many were sent?

A No, I don't remember.

[p. 83] Q Was it more than for just a day or two days?

A Yes, certainly. Yes.

Q Do you know the name of the person or persons that were sent?

A No.

Q Do you know the capacity that that person had when they were here, whether it was a representative to consult or did they actually do the assembly?

A They consult, but they do not make a physical assembly. And the consultant is for mechanical erection.

Q Okay. I'm going to change gears a little bit. Since I'm doing clean-up here, we're going to bounce around a little bit and I apologize. Are you still an employee of Nuovo Pignone S.p.A?

A Yes.

Q You are considered to still be a payroll employee?

A I am in the payroll of Nuovo Pignone S.p.A.

Q But you are assigned to Turbotecnica?

A I am assigned to Turbotecnica S.p.A.

Q Do you know if those persons working for Pignone S.p.A. – I'm sorry – PIGNONE, INCORPORATED in the United States are also considered to be employees of Nuovo Pignone S.p.A.?

[p. 84] MR. CANTER:

Considered by whom?

MR. DILL:

By Nuovo Pignone S.p.A.

THE WITNESS:

I cannot give you a legal answer.

CONTINUATION OF EXAMINATION BY MR. DILL:

Q Do you receive a paycheck from Nuovo Pignone S.p.A. on a regular basis today?

A Yes.

Q Do you know if the persons at PIGNONE, INCORPORATED in the United States receive a paycheck from Nuovo Pignone S.p.A.?

A I don't know.

Q Are you familiar with any of the other wholly-owned subsidiaries of Nuovo Pignone S.p.A. and how their personnel are associated to the parent company?

A In any country or in the United States?

Q In any country.

A Yes, I am familiar with this.

Q Which of the subsidiaries are you familiar with?

A For instance, with Pignone, Espanol.

Q Do you know if the persons that work for that company receive their paycheck from Nuovo Pignone S.p.A.?

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

NANCY G. PERÉ, et al	*	CIVIL ACTION
VERSUS	*	NO. CV94-1889
NUOVO PIGNONE, ET AL	*	JUDGE REBECCA DOHERTY
	*	MAGISTRATE JUDGE METHVIN

****

DEPOSITION OF MARIO SONCINI

(5-30-96)

* * *

[p. 35] motors.

Q Okay. What does it manufacture according to –

A What is in this page are centrifugal and axial compressors. This is one of the products designed and manufactured by Nuovo Pignone SpA.

Q Doctor, turn to page 47, if you don't mind. I think I've got it marked. Yeah, under the title, "Subsidiary Companies and Sales Offices" – Again, we're in "Exhibit #9," page 47. It indicates that PIGNONE has American organizations, PIGNONE, INC. and Pignone Textile Machinery, Inc. in Spartanburg. Is that in South Carolina?

A That's correct.

Q Okay. What, in the brochure you're holding, what is the purpose or the designated function of the Houston office of PIGNONE, INC., according to that document?

A Houston or –

A Houston.

A As I said before, PIGNONE, INC. headquarters are in [p. 36] New York. The other two offices are in Los Angeles and Houston.

Q Okay.

A And these offices promote and market all Pignone products – Nuovo Pignone products, with the exclusion of the textile machinery, which is another product of Nuovo Pignone in Italy. And this activity of promoting and selling textile machinery in the States is done through PTMI, Pignone Textile Machinery, Incorporated in Spartanburg South –

Q Carolina, right.

A Correct.

And that's all.

Q Okay. Doctor, in this document, it also states that the Houston office runs a spares depot which serves all machines installed in the American area.

What is a "spares depot"?

A This is a – is not a depot. It's more an area where we have very, very few parts for small machines

* * *

APPENDIX G – STATUTES – text of relevant provisions of the FSIA

This litigation involves the interpretation and application of provisions of the Foreign Sovereign Immunities Act:

28 USCS § 1602. Finding and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 USCS § 1603. Definitions

For purposes of this chapter [28 USCS §§ 1602 et seq] –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 USCS § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *

Supreme Court, U.S.
FILED
DEC 15 1998
CLERK

No. 98-885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NANCY G. PERÉ, INDIVIDUALLY AND
ON BEHALF OF HER MINOR CHILDREN,
MATTHEW REED PERÉ and MARCI DANIELLE PERÉ,
Petitioner,

v.

NUOVO PIGNONE S.P.A.,
COPPUS ENGINEERING and TUTHILL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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831P

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the District Court's ruling that a foreign corporation can be an "agency or instrumentality of a foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, even though the majority of its shares were never held directly by a foreign state or a political subdivision thereof.

2. Whether the Court of Appeals erred in holding that a foreign corporation may claim sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, notwithstanding the foreign state's divestiture of its ownership interest prior to the commencement of the litigation.*

---

* Respondents take no position regarding whether a writ of certiorari should be issued to review the third and fourth issues raised in the Petition; *i.e.*, the application of the "commercial activities" exception (28 U.S.C. § 1605(a)(2)); and the waiver of sovereign immunity through the execution of contracts containing arbitration and choice of law clauses.

LIST OF PARTIES

Plaintiff-Appellee below was Nancy G. Peré, the wife of Marcus Peré and the mother of their children, Matthew Reed Peré and Marci Danielle Peré. Defendant-Appellant was Nuovo Pignone, S.p.A. Coppus Engineering and Tuthill Corporation were Defendants-Appellees in the proceedings before the United States Court of Appeals for the Fifth Circuit.

Tuthill Corporation, a Massachusetts corporation, is the successor-in-interest to Coppus Engineering. Tuthill Corporation does not have a parent corporation or any subsidiaries other than those wholly-owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-885

NANCY G. PERÉ, INDIVIDUALLY AND
ON BEHALF OF HER MINOR CHILDREN,
MATTHEW REED PERÉ and MARCI DANIELLE PERÉ,
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v.

NUOVO PIGNONE S.P.A.,
COPPUS ENGINEERING and TUTHILL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents, Coppus Engineering and Tuthill Corporation (collectively referred to as "Tuthill"), respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 150 F.3d 477 (5th Cir. 1998) and is reprinted in the Appendix to Petitioner's brief ("Pet. App.") at A1. The Memorandum Ruling and Order of the United States District Court for the Western District of Louisiana, Lafayette-

Opelousas Division, are not reported, and are reprinted in Pet. App. at B1.

JURISDICTION

On April 29, 1997, the District Court entered its Memorandum Ruling and Order, holding that Respondent, Nuovo Pignone, S.p.A. ("Nuovo Pignone"), was not immune from suit under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1602-1611, and amendments to 28 U.S.C. §§ 1332, 1391 and 1441 ("FSIA"). Pet.App. B1. On August 7, 1998, the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the District Court's decision. Pet. App. A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of the FSIA. The specific provisions relied upon by Petitioner (28 U.S.C. §§ 1602, 1603 and 1605) are reprinted in the Appendix to the Petition at G1. Tuthill submits that, in addition to the provisions cited by Petitioner, 28 U.S.C. § 1604, entitled "Immunity of a foreign state from jurisdiction," is at issue in this case. The Statute provides:

> **Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts.

STATEMENT AND INTRODUCTION OF THE CASE

This case presents a confluence of two highly-contested issues relating to the interpretation and application of the FSIA: (1) whether a corporation can be an "agency or instrumentality of a foreign state," even though the ma-

jority of its shares were never held directly by a foreign state or a political subdivision thereof (*i.e.*, the "tiering" of ownership); and (2) whether a corporation may claim sovereign immunity notwithstanding the foreign state's divestiture of its ownership interest prior to the commencement of the litigation (i.e., the "timing" of ownership). Sharp splits amongst the Circuit Courts of Appeals have developed with respect to each of these issues. The divisions that currently exist frustrate the FSIA's stated purpose of bringing "uniformity in decision" to the determination of foreign sovereign immunity. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611 (1976).[1] *See* Res. Sup. App. 13a.

The importance of these issues cannot be overstated. The disparate treatment of foreign governments resulting from the inconsistent application of principles of foreign sovereign immunity can have adverse consequences on the United States' relations with other countries. *Id.* Moreover, with the globalization of the economy, American citizens, like Marcus Peré, have and will continue to "[come] into greater contact with foreign states. . .," *id.* at 2a, thereby confirming that, in the future, the lower courts will continue to be confronted with these issues. Further, a decision to grant sovereign immunity is outcome-determinative and effectively serves to deny plaintiffs, like the Petitioner, of a forum in which to present their claims and to be compensated for their losses. If left in its place, the Fifth Circuit's decision would compound the conflicts that have arisen in the lower courts, would potentially adversely impact foreign relations, and would lead to additional uncertainty regarding the rights of American citizens in their interactions with foreign entities.

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[1] H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 (1976), is set forth in the Respondents' Supplemental Appendix ("Res.Sup.App.") at 1a.

I. Factual Background

This lawsuit arises out of an accident that occurred off the coast of Angola on October 16, 1993. On that date, Marcus Peré, an instrument technician employed by Chevron Overseas Petroleum and/or Cabinda Gulf Oil Co. ("CABGOC"), was administering tests on a gas turbine system installed on a gas injection platform ("GIP-FOX"), when a starter turbine allegedly exploded, killing Peré. Pet. App. A2.

The starter turbine was purchased in 1974 from Coppus Engineering by AGIP USA, Inc. ("AGIP"), on behalf of Nuovo Pignone, an Italian company that designs and manufactures turbine systems. In 1979, almost five (5) years after it was purchased, Nuovo Pignone entered into an agreement with CABGOC for the sale of a turbine system that incorporated the starter turbine. Pet. App. A2; B2-B3. Nuovo Pignone manufactured, tested and inspected the parts of its turbine system in Italy. The parts then were shipped to Bayou Black, Louisiana for final manufacturing and assembly onto the gas injection platform. Nuovo Pignone personnel assisted in and supervised the installation of the turbine system onto the platform. Pet. App. A2; B3. After the turbine was assembled, the completed platform was shipped to CABGOC in the Molongo Field near Cabinda, Angola. Pet. App. A2.

At the time of the accident, the majority of Nuovo Pignone's shares were owned by Ente Nazionale Idrocaburi ("ENI"), a joint stock company. The Minister of Treasury of the Republic of Italy owned 100% of the shares of ENI. Following the accident, but prior to the commencement of the instant action, ENI transferred its majority interest in Nuovo Pignone to a consortium of private companies, led by General Electric. Pet. App. A4; B4.

II. Procedural History

A. Proceedings Before the District Court

The wife and children of Marcus Peré (collectively referred to as "Peré") commenced the instant action seeking to recover damages for the alleged wrongful death of Marcus Peré. Named as defendants were, *inter alia*, Nuovo Pignone, Coppus Engineering, and Tuthill Corporation. Peré claimed that the defendants defectively designed and/or manufactured the turbine system that allegedly exploded and caused the death of Marcus Peré. Pet. App. A1; B2.

Following discovery limited to jurisdictional issues, Nuovo Pignone moved for summary judgment, claiming that it was entitled to sovereign immunity under the FSIA. Specifically, Nuovo Pignone contended that, at the time of the events complained of, Nuovo Pignone was an agent or instrumentality of the Italian government and, therefore, was a "foreign state" entitled to immunity. Pet. App. A3; B4-B5. Peré filed a cross-motion for summary judgment, asserting that Nuovo Pignone was not an agent or instrumentality of Italy, because: (1) a majority of Nuovo Pignone's shares were not owned directly by the foreign state or a political subdivision thereof, as required under 28 U.S.C. § 1603(b) (the "tiering" issue); and (2) Italy did not have an ownership interest in Nuovo Pignone on the date the action was commenced (the "timing" issue). Peré further asserted that, even assuming *arguendo*, Nuovo Pignone was an agent or instrumentality of Italy, it was not entitled to sovereign immunity pursuant to 28 U.S.C. § 1605, as the lawsuit arose out of Nuovo Pignone's commercial activities in the United States. Pet. App. B4-B5.[2]

Treating the cross-motions for summary judgment as a motion to dismiss by Nuovo Pignone for lack of subject-

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[2] Tuthill filed in the District Court a memorandum opposing Nuovo Pignone's motion and supporting the cross-motion filed by Peré.

matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P., and an opposition thereto filed by Peré, the District Court held that Nuovo Pignone was not entitled to sovereign immunity. Pet. App. B5; B19. Recognizing that the effect of the tiering of ownership was a "difficult issue" over which the Circuit Court of Appeals had split, the District Court ruled that entities indirectly owned by a foreign state are agencies or instrumentalities of the foreign state. Pet. App. B9-B14. The District Court reasoned that the existence of ENI, the intermediary joint stock company, did not necessarily lessen Italy's control of Nuovo Pignone, because ENI was owned 100% by the Minister of Treasury of the Republic of Italy. The District Court acknowledged that a different result might be warranted if the foreign state held only a bare majority of the shares of an intermediary corporation that, in turn, held a bare majority of the shares of another entity. Pet. App. B13-B14.

The District Court also held that whether an entity is a foreign state should be considered as of the time of the events giving rise to the lawsuit, rather than the time of filing. The District Court reasoned that the foreign policy concerns of the FSIA do not necessarily dissipate once an entity is no longer controlled by the foreign state. Pet. App. B15. Accordingly, the District Court concluded that Nuovo Pignone qualified as a foreign state under the FSIA. Pet. App. B16.

Nonetheless, the District Court held that Nuovo Pignone was not entitled to sovereign immunity, as the "commercial activities" exception set forth in 28 U.S.C. § 1605(a)(2) applied. Specifically, the District Court determined that Nuovo Pignone's shipment of the gas turbine system to Louisiana and dispatch of representatives to Louisiana to supervise and/or consult in the assembly of the component parts of the turbine system constituted commercial acts in the United States with a "material connection" to Peré's cause of action. Pet. App.

B16-B19. As a result, the District Court denied Nuovo Pignone's motion to dismiss. Pet. App. B19.

B. The Fifth Circuit's Ruling

The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part the District Court's ruling. The panel held that Nuovo Pignone was a foreign state under the FSIA, notwithstanding the change in ownership prior to the commencement of the action, reasoning that "courts are to look at the defendant's status at the time the litigated events occurred." Pet. App. A5. Like the District Court, the panel reasoned that "the foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed." Pet. App. A5 (citing *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993)).[3]

The panel reversed the District Court's ruling that the commercial activities exception applied. Pet. App. A6-A9. Specifically, the panel concluded that Peré had failed to establish a "material connection" between Nuovo Pignone's act of sending representatives to Louisiana to supervise and/or consult in the final assembly of the component parts of the turbine system onto the platform and Peré's wrongful death action, premised upon allegations of wrongful design and/or manufacturing. Pet. App. A8-A9.

---

[3] The panel affirmed the District Court's decision that Nuovo Pignone was a foreign state without specifically discussing the tiering issue addressed by the District Court.

REASONS FOR GRANTING THE PETITION

I. A SHARP CONFLICT EXISTS AMONG THE CIRCUITS REGARDING WHETHER A CORPORATION IS AN "AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE," EVEN THOUGH THE MAJORITY OF ITS SHARES WERE NEVER HELD DIRECTLY BY A FOREIGN STATE OR ITS POLITICAL SUBDIVISION

There is a deeply-rooted conflict among the Circuits concerning whether the immunity granted under the FSIA extends to second-tier corporate subsidiaries. The Ninth Circuit has ruled that a corporation is not an "agency or instrumentality of a foreign state" if a majority of its shares are not directly owned by the foreign state or a political subdivision thereof. The Fifth, Sixth, Seventh and District of Columbia Circuits have held the opposite. An analysis of the leading cases from the Circuits is set forth below.

A. A Second-Tier Corporate Subsidiary is not an "Agency or Instrumentality of a Foreign State"

Ninth Circuit

The Ninth Circuit considered whether sovereign immunity should be granted to second-tier corporate subsidiaries of foreign states in *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir.), *cert. denied,* 516 U.S. 869 (1995). In *Gates*, the Defendant, Fletcher's Fine Foods ("FFF"), was a wholly-owned subsidiary of Alberta Pork, a Canadian entity established by Alberta law to promote the province's pork industry. After determining that Alberta Pork was an "agency or instrumentality of a foreign state," the Ninth Circuit concluded that the express language of 28 U.S.C. § 1603 precluded a finding that FFF, the second-tier subsidiary, was also an "agency or instrumentality of a foreign state":

> To be an "agency or instrumentality," the entity must either be an "organ of a foreign state" or have a

> majority of its shares owned by a "foreign state or political subdivision thereof." 28 U.S.C. § 1603(b) . . . FFF is wholly owned by an agency or instrumentality of a foreign state; however, FFF is not owned by a "foreign state or political subdivision thereof," as required by the statute.

Id. at 1462.

The Ninth Circuit rejected FFF's argument that its parent, Alberta Pork (itself "an agency or instrumentality of a foreign state"), was a "foreign state or political subdivision thereof":

> . . . [T]he literal language of the statute requires us to reject that argument. First, the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of section 1603, then it also would have intended a "political subdivision" to mean "a foreign state" because section 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." The statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof" . . .
>
> Moreover, the legislative history repeatedly draws the same distinction. In the House Report Congress stated:
>
> > The second criterion [of § 1603(b)] requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a for-

> eign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision. 1976 U.S.C.C.A.N. 6604, 6614 (emphasis added).

Gates, 54 F.3d at 1462.

The Ninth Circuit refused to expand the scope and reach of the Statute beyond the limitations imposed by its express language:

> Indeed, our reluctance to put words in Congress' mouth is especially justified here because Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or poliitcal subdivision. It did not. Moreover, a contrary reading of the statute could expand immunity far beyond what Congress intended. As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision. Although such a broad view

> of soverign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

Id. at 1462 (internal footnotes omitted). The Ninth Court has adopted a bright-line rule that sovereign immunity is not to be extended to second-tier subsidiaries.[4]

B. A Second-Tier Corporate Subsidiary is an "Agency or Instrumentality of a Foreign State"

Seventh Circuit

The Seventh Circuit reached the opposite conclusion in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 96 F.3d 932 (7th Cir. 1996). The Defendant, Avions de Transport Regional, G.I.E. ("ATR"), was a subsidiary of two (2) European commercial aerospace companies, the majority of whose shares were owned respectively by France and Italy. *Id.* at 935-36. In ruling that, notwithstanding the *Gates* decision, a second-tier subsidiary of a foreign state may be an "agency or instrumentality" of the foreign state, the Seventh Circuit reasoned:

> The plain language of § 1603(a) defines "foreign state" broadly. The House Report's analysis of that statute confirms this broad definition set out in the statute. . . . There, the committee specified that § 1603(a)'s definition of "foreign state" applied to all provisions in the Act except § 1608, where it referred only to a foreign sovereign. This distinction is again made in 28 U.S.C. § 1611(b) (". . . the property of a foreign state shall be immune from

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[4] Although the issue has not been addressed specifically by the Second Circuit, two (2) District Courts in the Circuit, following *Gates*, have ruled that the FSIA does not apply to companies majority-owned by a foreign state's agency or instrumentality. *Hyatt Corp. v. Stanton*, 945 F.Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter Int'l v. Iberia Lineas Aeras de Espana, S.A.*, 896 F.Supp. 125 (S.D.N.Y. 1995).

> attachment and from execution, if—(1) the property is that of . . . its parent foreign government. . . ."). To limit "foreign state" to "foreign sovereign" or "foreign government" would be to rewrite the Act, which is obviously beyond our role as judges. . . The use of "includes" shows Congress' intent to broadly define "foreign state." This is consistent with the statement in the legislative history that instrumentalities could assume "a variety of forms" . . ., including "a transport organization such as an . . . airline."

Id. at 940 (internal citations omitted). *See also Ocasek v. The Flintkote Co.*, 796 F.Supp. 362 (N.D.Ill. 1992) (fourth-tier corporate subsidiary qualified as an "agency or instrumentality of a foreign state").

Fifth Circuit

In the instant action, the Fifth Circuit affirmed the District Court's ruling that ENI's ownership of a majority of Nuovo Pignone's shares did not preclude extension of sovereign immunity. *See also Linton v. Airbus Industrie*, 30 F.3d 592, 598 n.2 (5th Cir.) ("The controlling statute . . . erects no explicit bar to the methods by which a foreign state may own an instrumentality. . . . There is no mention of 'voting' or 'control' majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving"), *cert. denied*, 513 U.S. 1044 (1994).

Sixth Circuit

In *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995), the defendant was a subsidiary of Societe National de L'Amiante, a Crown Corporation of Canada. In determining whether Atlas was required to be served pursuant to 28 U.S.C. § 1608(e), the Sixth Circuit concluded that the second-tier subsidiary was "an instrumentality of a foreign state." *Id.* at 109.

District of Columbia Circuit

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982), was an action brought against the Republic of Ireland and three (3) Irish corporations. The panel ruled that an entity wholly-owned by an instrumentality of the government of the Republic of Ireland qualified as a "foreign state." *Id.* at 1026 n.19. *See also Millicom Int'l Cellular, S.A. v. Republic of Costa Rica,* 995 F.Supp. 14, 18 n.5 (D. D.C. 1998) (an entity that is "majority owned by a foreign state" includes an entity majority owned by an agency or instrumentality of a foreign state) (citing *Gilson* and *Air Crash Disaster Near Roselawn, Indiana*).

C. The Split in the Circuits Should Be Resolved in Favor of a Bright-Line Rule That Sovereign Immunity Does Not Extend to Second-Tier Subsidiaries

The bright-line rule that second-tier subsidiaries may not claim sovereign immunity is consistent with the express language of the Statute. As the Ninth Circuit ruled in *Gates,* under 28 U.S.C. § 1603(b)(2), a corporation is an "agency or instrumentality of a foreign state" only if a majority of its shares or other ownership interest is owned directly by a foreign state or a political subdivision thereof. *Gates,* 54 F.3d at 1462. The express language of the FSIA does not extend immunity to corporations that are not directly owned by the foreign state or a political subdivision thereof.

Extension of immunity to second-tier subsidiaries also would contravene international law. The prevailing international rule as to corporations owned by foreign states is the "separate entity" rule: entities with separate legal personalities are presumed not to possess sovereign immunity. *See* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity*

Purposes?, 65 Tul. L. Rev. 535, 542-65 (1991), and cases cited therein. The presumption can be overcome only if the entity establishes that it was performing sovereign functions. *Id.* at 542-43. In enacting the FSIA, Congress deviated from the separate entity rule (still followed by most other foreign states) and extended immunity only to entities owned by a foreign state and its political subdivisions. As the Ninth Circuit stated in *Gates*:

> Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or political subdivision. It did not.

Gates, 54 F.3d at 1462.

A decision to extend sovereign immunity to second-tier corporations also creates a "slippery slope." If the requirement that the foreign state must directly own a majority of a corporation's shares is eliminated, the FSIA, theoretically, could apply to every subsidiary of a corporation (*i.e.*, third-, fourth- or tenth-tier subsidiaries). There would be no limit on how far removed a corporation could be from sovereign control, yet still be covered under the FSIA. There is no indication that Congress intended such a result. Thus, a corporation whose shares are not directly owned by the foreign state should not be granted immunity under the FSIA.

II. THE CIRCUITS ARE DIVIDED AS TO WHETHER A CORPORATION MAY CLAIM SOVEREIGN IMMUNITY, NOTWITHSTANDING THE FOREIGN STATE'S DIVESTITURE OF ITS OWNERSHIP INTEREST PRIOR TO THE COMMENCEMENT OF THE LITIGATION

The statutory definition of a "foreign state," 28 U.S.C. § 1603(a), does not specifically address the temporal

reference that should be considered in determining whether an entity is a foreign state. In the absence of statutory guidance, the lower courts have adopted and employed divergent rules. The Ninth Circuit looks to the time that the lawsuit was commenced in assessing whether an entity is a foreign state under 28 U.S.C. § 1603(a). The Third, Fifth, Sixth, Eighth and Eleventh Circuits are in conflict with this interpretation, concluding that the appropriate reference point is the time of the underlying events.

A. Whether an Entity Is a Foreign State Should Be Determined as of the Date the Lawsuit Was Commenced

In *Straub v. Atlas Turner, Inc.*, 38 F.3d 448 (9th Cir. 1994), the defendant was not owned by the foreign state at the time of the acts giving rise to the lawsuit. The Ninth Circuit held that the FSIA "is applicable when a party is a foreign state at the time the lawsuit is filed, even if that party was not a foreign state at the time of the alleged wrongdoing." *Id.* at 451.[5]

B. Whether an Entity Is a Foreign State Should Be Determined as of the Date of the Occurence of the Events Underlying the Lawsuit

Sixth Circuit

The Sixth Circuit's holding in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), is inconsistent with the Ninth Circuit's ruling in *Straub*. In *Gould*, one of the defendants wah privatized during the pendency

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[5] The District Court in *Ocasek v. The Flintkote Co.*, 796 F.Supp. 362 (N.D. Ill. 1992), similarly ruled that the time period to be referenced to assess whether an entity is a foreign state is the date the complaint was filed, because subject matter jurisdiction must exist as of that date. *But see Leith v. Lufthansa German Airlines*, 897 F.Supp. 1115 (N.D. Ill. 1995) (privatization of corporation subsequent to accrual of cause of action did not deprive the court of jurisdiction).

of the appeal. Nonetheless, the Sixth Circuit held that it was entitled to immunity:

> The subject matter jurisdiction granted to the district courts by the FSIA in 28 U.S.C. § 1330(a) . . . is neither diversity nor alienage jurisdiction, but federal question jurisdiction. . . . It would appear that the determination of whether a party is subject to the court's jurisdiction under 28 U.S.C. § 1330(a) should be based upon a party's status at the time the act complained of occurred. . . As to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts.

Id. at 450 (internal citations and footnotes omitted).

Eighth Circuit

Following *Gould,* the Eighth Circuit, in *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376 (8th Cir. 1993), held that Air Canada was a "foreign state" under the FSIA, even though it had been privatized prior to the filing of the lawsuit. In reaching its conclusion, the panel determined that the use of the present tense in the FSIA and the House Report to define an "agency or instrumentality of a foreign state" did not establish a congressional intent that immunity be accorded only if an entity is a foreign state at the time a lawsuit is commenced, because "the use of the word 'is' could speak to a variety of situations, including the time of the alleged wrongdoing." *Id.* at 1381. The panel further reasoned that the "foreign policy concerns discouraging [courts] from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit." *Id.*

The Eighth Circuit rejected the argument that the laws governing diversity jurisdiction, diplomatic immunity and the act of state doctrine provide immunity only when the entities have the required status when the lawsuit is commenced and, accordingly, supported a finding that an

entity's status as a foreign state should be determined as of the time of suit. *Id.* at 1381-82. The panel reasoned:

> "Diversity jurisdiction exists to protect out-of-state litigants from state court bias." . . . Thus, it is consistent that the party's status at the time of suit controls for the purpose of determining whether diversity jurisdiction exists. Unlike the underlying purpose of diversity jurisdiction, the foreign policy considerations underlying sovereign immunity are not necessarily eliminated when the defendant loses its status as a foreign state before the time of filing suit. Diplomatic immunity and sovereign immunity, on the other hand, share the similar objective of protecting governmental decisions from judicial scrutiny. . . . Diplomatic immunity, however, is not necessarily lost when a person loses his diplomatic status before the time of filing suit. Thus, the law of diplomatic immunity does not support [Plaintiff's] interpretation of the Act. The act of state doctrine is also driven by comity concerns between existing sovereigns. . . The cases cited by appellant interpreting the act of state doctrine do not say that the defendants' status at the time of suit controls for the purpose of determining whether the act of state doctrine applies. . .

Id. (internal citations omitted). In sum, the Eighth Circuit found dispositive that the lawsuit concerned the conduct of the entity when it was an "agency or instrumentality" of the foreign state.

Fifth Circuit

In the instant action, the Fifth Circuit held that "courts are to look at the defendant's status at the time the litigated events occurred." Pet. App. A5. Following the Eighth Circuit's ruling in *General Electric,* the panel reasoned that "the foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed." Pet. App. A5.

Third Circuit

The Third Circuit's ruling in *Fidelity & Casualty Co. v. Texas Eastern Transmission Corp.*, 15 F.3d 1230 (3rd Cir.), *cert. denied*, 513 U.S. 915 (1994), similarly provides that the time for determining whether an entity is a foreign state is the time of the underlying events. In *Fidelity & Casualty Co.*, the panel noted that the FSIA did not apply, because the defendant was not a foreign state at the time it entered into the contracts at issue. *Id.* at 1244.

Eleventh Circuit

The Eleventh Circuit also has ruled that the time period to be referenced in determining whether an entity is a foreign state is the time of the underlying events. *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347-48 (11th Cir. 1988) (concluding that the FSIA was inapplicable because the entity was not an instrumentality of the foreign state at the time of the transactions at issue), *rev'd on other grounds, Granfinanciera, S.A. v. Norberg*, 492 U.S. 33 (1989).

C. The Split in the Circuits Should Be Resolved in Favor of a Rule that an Entity Must Be a Foreign State During the Pendency of the Lawsuit

Requiring an entity to be a "foreign state" during the pendency of the lawsuit is consistent with the express language of the Statute and the underlying House Report. Both define the phrase "agency or instrumentality of a foreign state" by using only the present tense. *See* 28 U.S.C. § 1603(b) ("an 'agency or instrumentality of a foreign state' means an entity—(1) which *is* a separate legal person . . .; (2) which *is* an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision thereof; and (3) which *is* [not] a citizen of a State of the United States . . .); Res.

Sup.App. 17a ("The first criterion, that the entity *be* a separate legal person, is intended to include a corporation . . . The second criterion requires that an entity *be* either an organ of a foreign state . . ., or that a majority of the entity's shares or other ownership interest *be* owned by a foreign state. . . . The third criterion excludes entities which *are* citizens of a State of the United States") (emphasis supplied). In contrast, later provisions of the FSIA expressly differentiate between the past and present tense. *See, e.g.*, 28 U.S.C. § 1610(a)(1) (establishing an exception to immunity from attachment or execution for property in the United States, if "the property *is or was* used for the commercial activity upon which the claim is based); 28 U.S.C. § 1610(b)(1) (establishing an exception to immunity from attachment or execution for property of an agency or instrumentality of a foreign state if "the judgment relates to a claim for which the agency or instrumentality is not immune . . ., regardless of whether the property *is or was* involved in the act upon which the claim is based") (emphasis supplied).

Congress recognized a distinction between the present (*i.e.*, the time of suit) and the past (*i.e.*, the time of underlying acts) in drafting the FSIA. The absence of any use of the past tense in the statutory definition of an "agency or instrumentality of a foreign state," indicates that Congress intended that the assessment of whether a defendant is a "foreign state" be determined in reference to the pendency of the suit. *See Dickerson v. New Banner Institute*, 460 U.S. 103, 116 (1983) ("[The] use of the respective tenses is significant and demonstrates that Congress carefully distinguished between present status and a past event"). *Contra General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993).

Moreover, although the privatization of an entity after the occurrence of the underlying events does not eliminate the need to review the prior acts of the foreign state, it does minimize the likelihood that foreign relations could

or would be strained as a result of the lawsuit. Only the presence of a foreign state during the pendency of the suit raises the possibility that a judgment would be entered directly against the foreign state and that the plaintiffs would seek to execute the judgment against state property. The foreign policy concerns raised in cases against corporations owned by foreign states far exceed any that may potentially be involved in suits against entities that are owned by private investors during the pendency of the lawsuit.[6] Accordingly, a corporate defendant should be entitled to claim sovereign immunity only if it is a foreign state during the pendency of the lawsuit.

III. THE ISSUES RAISED ARE IMPORTANT AND SHOULD BE RESOLVED AT THIS TIME

In addition to augmenting the conflicts that have arisen among the Circuit Courts, the Fifth Circuit's ruling in this case unnecessarily broadens the scope and reach of the FSIA. The FSIA was drafted by Congress to "[codify] the so-called 'restrictive' theory of foreign sovereign immunity."[7] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992); Res.Sup.App. 3a. In adopting the restrictive theory, Congress attempted to strike a delicate balance between two (2) competing interests: (1) the need to establish procedural safeguards for foreign states engaged in sovereign activities; and (2) the need to provide a procedural mechanism for plaintiffs to seek redress for injuries suffered as a result of the private or commercial acts of a foreign state. Res.Sup.App. 2a-3a.

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[6] Neither the Circuit Court nor the District Court identified any specific foreign policy concerns raised by the instant action.

[7] Under the restrictive, as opposed to the "absolute," theory of immunity, a foreign state is immune from the jurisdiction of U.S. courts for actions arising out of its sovereign acts, but not for lawsuits based upon acts that are private or commercial in nature. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983).

The Fifth Circuit's ruling that second-tier subsidiaries and corporations that are not owned by the foreign state during the pendency of the lawsuit are immune from jurisdiction expands exponentially the number of entities that can qualify for sovereign immunity. As discussed above, the extension of immunity to remote or former corporate sibsidiaries is not required by international law. Foreign courts applying the "separate entity rule," would not grant immunity under similar circumstances.

The extension of immunity to remote and/or former corporate subsidiaries of a foreign state also is contrary to the express language of the FSIA. The FSIA accords immunity only to "foreign states", including "political subdivisions" and "agencies or instrumentalities" of a foreign sate; the express language of the Statute does not extend immunity to entities, like Nuovo Pignone, that are owned by a first-tier agency or instrumentality of a foreign state. Pet.App. G1-G2. Similarly, by referring to foreign states and by defining "agency or instrumentality of a foreign state" only in the present tense, the express language of the FSIA also indicates that a corporation is entitled to immunity only if it is an agency or instrumentality of a foreign state (or political subdivision thereof) during the pendency of the lawsuit. *Id.*

The expansion of the number and nature of entities entitled to claim sovereign immunity comes at the expense of injured American citizens, like the Petitioner. The FSIA provides the sole and exclusive basis for obtaining jurisdiction over a foreign state in this country. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); Res.Sup.App. 11a-14a. Thus, unless the American citizen has the resources to commence litigation in a foreign country, a ruling that a foreign corporation is entitled to sovereign immunity in the United States will effectively deny relief. As a result of the continued globalization of the economy, a growing number of Americans will face this dilemma and will be denied resource for

injuries suffered in connection with their interactions with remote and/or former corporate subsidiaries of a foreign state. *See* Res.Sup.App. 2a. Accordingly, the Fifth Circuit's ruling upsets the balance struck by Congress in enacting the FSIA.

As noted above, the split in the Circuits as to these issues is deep-rooted. The application of divergent rules could potentially impede U.S. relations with other countries, as varying degrees of deference are accorded to the activities engaged in by foreign entities. Moreover, the movement towards a global economy confirms that, in the future, the lower courts will continue to be confronted with these issues. This case presents this Court with the opportunity to clarify the law and to restore a "uniformity in decision" to the application of foreign sovereign immunity. *See* Res.Sup.App. 13a.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

House Report (Judiciary Committee) No. 94-1487,
Sept. 9, 1976 [To accompany H.R. 11315]

Senate Report (Judiciary Committee) No. 94-1310,
Sept. 27, 1976 [To accompany S. 3553]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House September 29, 1976
Senate October 1, 1976

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 94-1487

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * * *

PURPOSE

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

STATEMENT

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication

transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plain-

tiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure

due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country —where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would confirm the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)[1] and *Mexico* v. *Hoffman*, 324 U.S. 30 (1945).[2]

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952, 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to

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[1] 63 S.Ct. 793, 87 L.Ed. 1014.

[2] 65 S.Ct. 530, 89 L.Ed. 729.

exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in Foreign Courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in in-

stances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the Bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960's. In the early 1970's, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

COMMITTEE AMENDMENTS

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been deleted and the former section 1605(c) has been renumbered as section 1606. The public debt provision was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan

from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation

of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules the bill, this would mean service under section 1608 (a) or (b).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

Conclusion

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

Section-by-Section Analysis

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943)[3].)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained

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[3] 63 S. Ct. 793, 87 L.Ed. 1014.

against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested * * * in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States * * *." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370-71 (1955)[4] (Reed J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964).[5]

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agen-

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[4] 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

[5] 84 S.Ct. 923, 11 L.Ed.2d 804.

cies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question

of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945),[6] and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).[7] For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims

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[6] 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.

[7] 78 S.Ct. 199, 2 L.Ed.2d 223.

which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605-1607 for not granting immunity, including waivers.

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332 (c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97:
SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subection (b) defines an "agency or instrumentality of a

foreign state" as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such

entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605-1607 and 1610-1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States.*—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity.*—Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of

a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

(e) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605 (a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States —for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to

foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international

agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

(a)(1) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the for-

eign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a "commercial activity" is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the foreign state." This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the

foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913),[8] or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).[9]

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where

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[8] 33 S.Ct. 443, 57 L.Ed. 742.

[9] 89 S.Ct. 872, 21 L.Ed.2d 784.

"rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).[1]

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[1] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the art of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill* v. *Republic of Cuba*, 44 U.S.L.W. 4665. No. 73-1288 (May 24, 1976, the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the

(a)(4) *Immovable, inherited, and gift property.*—Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23 UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of owner-

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Dunhill case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committe are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of soverign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

ship, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is

available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with repect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C.

741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached the plaintiff will lose his in personam remedy and the foreign state will be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its cousel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608 (c). The reason for this second requirement is to help make certain that the foreign state concerned receives

prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordacne with other provisions of the bill—e.g., section 1605 (a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723-26 (1943); Garcia-Amador, State Responsibility, 94 Hague Recueil des Cours 365, 476-81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this

area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.[2] Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article I of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604-1606, it would not be immune from a counterclaim "arising out of the transaction of occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See, *Alfred Dunhill of*

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[2] e.g. 5 U.S.C. 552 concerning public information.

London, Inc., v. *Cuba*, —— U.S. ——, No. 73-1288, decided May 24, 1976).[10]

Third, notwithstanding that the foreign state may be immune under sections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).[11]

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605-1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605-1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 15 U.S. 21(f) and 77v.

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or

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10 96 S.Ct. 1854, 48 L.Ed.2d 301.

11 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

instrumentality of a foreign state which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court should send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(D), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Service in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn,

would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra,* which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA-10922, June 16, 1961, 56 Am. J. Int'l L. 523-33 (1962).

(b) *Service on Agencies or Instrumentalities.*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603 (b). Again, service must always be made in accordance with any special arrangement for service between a plain-

tiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of any agency on instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra.*

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authorizes a court to fashion a method of service, for example under Rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore,* 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd,* 238 F. 2d 400 (2d Cir. 1956).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision

thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[3] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608 (a) or (b).

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second, means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsist-

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[3] Cf. Statement in the analysis of section 1606 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P. for an unjustifiable failure to make discovery.

ency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature. *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the juris-

diction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement or judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2,

1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 438-39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank,* 21 Misc. 2d 1086, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

(a) *Execution Against Property of Foreign States.* Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The prop-

erty in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)-(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605 (a)(1) of the bill. A foreign state may have waived its immunity from execution, *inter alia,* by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against property used by a foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the

suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971, A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605 (a)(3).

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610 (a) and (b); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign

state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610(b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or instrumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a), (2), (3) or (5), or 1605(b). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a)(2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and execution.

(a) *Property held by international organizations.*—Section 1611(a) precludes attachment and execution against funds and other property of certain international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the Internatioial Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include, *inter alia,* the International Monetary

Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel and office equip-

ment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 5. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district

in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil

actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(c), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl. 1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332 (c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

STATEMENTS UNDER CLAUSE 2(1)(2)(B), CLAUSE 2 (1)(3) AND CLAUSE 2(1)(4) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COMMITTEE VOTE

(Rule XI 2(1)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of this bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of any suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

OVERSIGHT STATEMENT

(Rule XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility with reference matters involving the immunity of foreign states, in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(1)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(a)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(1)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(1)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 6, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CAIRMAN: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office

has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

ALICE M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(1)(3))

In compliance with clause 2(1)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

* * * *

[The executive communication from the Departments of State and Justice is as follows:]

DEPARTMENT OF STATE,
Washington, D.C., October 31, 1975.

HON. CARL O. ALBERT,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: The Department of State and Department of Justice submit for your consideration and appropriate reference the enclosed draft bill, entitled "To define the circumstances in which foreign states are im-

mune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Advisor, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommenda-

tions of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in section 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(b)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(a)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

ROBERT S. INGERSOLL,
Deputy Secretary of State.
HAROLD R. TYLER, JR.,
Deputy Attorney General.

Supreme Court, U.S.
FILED
DEC 30 1998
OFFICE OF THE CLERK

No. 98-885

In The

Supreme Court of the United States

October Term, 1998

NANCY G. PERE', individually and on behalf of her minor children, Matthew Reed Pere' and Marci Danielle Pere',

Petitioner,

versus

NUOVO PIGNONE S.p.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding for purposes of the application of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, that a defendant's foreign state status is determined at the time of the events giving rise to the litigation even though the defendant is a private entity at the time the lawsuit is filed.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in holding for purposes of the second clause of the "commercial activity" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), that a "material connection" must exist between a commercial act occurring in the United States and the plaintiff's cause of action.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in finding that a foreign state does not waive its jurisdictional immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, in a personal injury lawsuit simply because it has signed a contract with a third party which contains an arbitration clause and a choice of law provision selecting Texas law.[1]

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[1] Defendant-Respondent, Nuovo Pignone, S.p.A., submits that the so-called "tiering" argument presented to this court by both Petitioner and Defendant-Respondents, Coppus Engineering, Inc. and Tuthill Corporation, has been waived or abandoned by the parties as a result of not being raised on appeal before the Fifth Circuit. *See* Argument, *infra*, at Section II(A).

LIST OF PARTIES

Petitioner and Plaintiff-Appellee below is Nancy G. Peré. She has filed this lawsuit individually and on behalf of her minor children, Matthew Reed Peré and Marci Danielle Peré, for injuries resulting from the death of Marcus Peré, her husband and the minor children's father.

Respondent and Defendant-Appellant below is Nuovo Pignone, S.p.A. Its wholly owned subsidiary, Pignone, Inc., remains a defendant in the court below. Nuovo Pignone, S.p.A. is presently owned by a consortium of entities with its leading shareholder being General Electric Company.

Respondent and Defendant-Appellee below is Tuthill Corporation. Tuthill Corporation is the successor-in-interest to co-defendant Coppus Engineering. Tuthill Corporation has no subsidiary or parent corporations. For purposes of this Petition for Certiorari, Tuthill Corporation has aligned itself with Petitioner.

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Nuovo Pignone, S.p.A. ("Nuovo Pignone"), respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Nancy G. Peré and submits that this Honorable Court should deny the Petition.

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 150 F.3d 477 (5th Cir. 1998) and is reprinted in the Appendix to Petitioner's brief ("Pet. App.") at A1. The Memorandum Ruling and Order of the United States District Court for the Western District of Louisiana, Lafayette Division is unreported, but is reprinted in Pet. App. at B1.

STATUTES INVOLVED

This Petition involves the interpretation and application of the Federal Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. The relevant sections of the FSIA include 28 U.S.C. § 1602, 1603, 1604 and 1605. Petitioner has included the relevant statutes in her Petition at Pet. App. at G1 with the exception of 28 U.S.C. § 1604 which is reproduced below.

> **28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts.

I. STATEMENT OF THE CASE

This case presents issues regarding the interpretation and application of the FSIA to Defendant-Respondent, Nuovo Pignone. To the extent Petitioner has not waived or abandoned issues presented to this Court, there is no split in the circuit courts regarding these issues and, therefore, no compelling need for this Court to grant the Petition. Moreover, even if grounds were present suggesting that this Court review the decision of the court below, the United States Court of Appeals for the Fifth Circuit correctly decided the case and review is therefore unnecessary.

A. Factual Background

Petitioner's decedent, Marcus Peré ("Peré"), was employed by Chevron Overseas Petroleum and/or Cabina Gulf Oil Co. ("CABGOC"), a division of Chevron, as an instrument technician in Angola, off the coast of West Africa. Pet. App. at A2. CABGOC is an oil company operating off the coast of West Africa. Pet. App. at A1-A2.

In 1974, Nuovo Pignone, an Italian company that designs and builds turbine systems, purchased a starter

turbine from Coppus Engineering ("Coppus/Tuthill"), a United States company, to be incorporated into a turbine system. Pet. App. at A2. In 1979, Nuovo Pignone contracted with CABGOC for the sale of th rteen identical turbine systems. One of those thirteen turbine systems incorporated the starter turbine sold by Coppus/Tuthill. It was this turbine system that was involved in the death of Peré. Nuovo Pignone manufactured, tested and inspected the incident turbine system in Italy. Pet. App. at A2. The incident turbine system was then shipped to Bayou Black, Louisiana for installation on a platform which was itself subsequently shipped to the CABGOC facility off the coast of Angola, Africa as a complete unit. Pet. App. at A2.

There was testimony that a Nuovo Pignone representative might have been present for this installation of the turbine system onto the platform in Louisiana, but the representative would have only served a consulting function with regard to the mechanical erection of the turbine system onto the platform; he would not have participated in the physical erection/installation of the system onto the platform nor would he have been engaged in any design or manufacture of the turbine system itself in Louisiana. Pet. App. at A8.

On 16 October 1993, Peré was working on the gas injection platform "GIP-FOX," located off the coast of Angola in West Africa. Pet. App. at A2. He was performing testing procedures on a gas turbine system when, as alleged by plaintiff, the starter turbine manufactured by Coppus/Tuthill and incorporated into the Nuovo Pignone turbine system, exploded and fatally injured him. Pet. App. at A1; Pet. App. at D5.

At the time of the accident, a majority of the shares of Nuovo Pignone were owned by Ente Nazionale Idrocaburi ("ENI"). Pet. App. at A3. ENI is a joint stock company reporting to the Minister of Treasury of Italy who held the majority of ENI's shares for the benefit of the Republic of Italy. Pet. App. at A3. ENI was created by the Republic of Italy for the purpose of leading Italy's oil and gas development and exploration. Pet. App. at A3. After the events involved in this case, including the death of Peré, but before Petitioner filed her lawsuit, a majority of the shares in Nuovo Pignone were sold to a consortium of private companies. Pet. App. at A4.

B. Proceedings in the District Court

Plaintiff-Petitioner commenced this action in the United States District Court for the Western District of Louisiana, Lafayette Division along with two other virtually identical suits in the Southern District of Texas (Galveston and Houston Divisions). Pet. App. at B3 n.1. The three courts later entered a series of rulings which ultimately resulted in the consolidation of all claims in the United States District Court for the State of Louisiana. Pet. App. at B3 n.1. In the action, Plaintiff-Petitioner alleged that the turbine system, which included the Coppus/Tuthill starter turbine and which was involved in the fatal incident, was defectively designed and/or manufactured by Nuovo Pignone and others. Pet. App. at A2-A3; Pet. App. at D1.

In the district court, Nuovo Pignone moved for summary judgment seeking dismissal of plaintiff's claims pursuant to the FSIA. Pet. App. at B4-B5. Plaintiff and

defendants, Coppus Engineering and Tuthill Corporation, filed cross motions/oppositions challenging the propriety of dismissal under the FSIA. Pet. App. at B4-B5. The district judge regarded these motions/oppositions as Rule 12(b)(1) pleadings, inasmuch as the invocation of the FSIA challenged the court's subject matter jurisdiction. Pet. App. at B4-B5.

The district judge entered a Memorandum Ruling and Order denying Nuovo Pignone's request for dismissal. Pet. App. at B1. The district judge concluded that although the FSIA applied to Nuovo Pignone, and Nuovo Pignone qualified as a foreign state, the statute's "commercial activities" exception, 28 U.S.C. § 1605(a)(2), precluded dismissal. Pet. App. at A1-A2; Pet. App. at B19. An appeal on behalf of Nuovo Pignone ensued.

C. The Fifth Circuit Decision

Nuovo Pignone appealed the district court's Memorandum Ruling and Order arguing to the Fifth Circuit that although the district court was correct in finding Nuovo Pignone to be a foreign sovereign, the district court nevertheless erred in concluding that Plaintiff-Petitioner met her burden of proof on the applicability of the "commercial activities" exception to the FSIA, 28 U.S.C. § 1605(a)(2).

In response to these arguments, both Plaintiff-Petitioner and Defendant-Respondent Coppus/Tuthill submitted opposition briefs arguing that the district court properly found the commercial activities exception. Appendix at 15-21; 40-46. They each further argued that in order to be immune under the FSIA a defendant must

be a foreign sovereign at the time the lawsuit is filed as opposed to when the events underlying the action occurred. Appendix at 23-24; 46-48. Thus, they argued that Nuovo Pignone's recent privatization mandated that it be subject to a lawsuit in the United States regardless of its prior sovereign status. *Id.* Finally, Plaintiff-Petitioner made the further argument that Nuovo Pignone had waived its sovereign immunity through contractual agreement. Appendix at 22. Significantly, neither Plaintiff-Petitioner nor Defendant-Respondent Coppus/Tuthill made any argument to the Fifth Circuit regarding the "tiering" issue now presented by both Petitioner and Coppus/Tuthill for this Court's review.[2] Appendix at 6, 32.

The Fifth Circuit rejected the argument that the foreign sovereign status determination is made at the time suit is filed, stating:

> Whether the FSIA covers an entity now private that was state owned at the time of the disputed event(s) is a first impression within this Circuit. Having studied both *Straub*[3] and *General Electric*,[4] we are persuaded by the Eighth Circuit's reasoning in *General Electric*. As the

---

[2] "Tiering" as that term is used in FSIA analysis refers to the issue of whether an entity must be directly owned by a foreign sovereign to be entitled to FSIA immunity as agency or instrumentality of a state or whether it may be, for example, a subsidiary of another company that is owned by a foreign sovereign. *See In re Air Crash Disaster near Roselawn, Indiana*, 96 F.3d 932, 939-941 (7th Cir. 1996) (discussing tiering under the FSIA).

[3] *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994).

[4] *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993).

> Eighth Circuit stated, "the doctrine of foreign state sovereign immunity was created to effectuate general notions of comity among nations." *Id.* at 1382 (internal quotations and citations omitted). The foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed. Thus, courts are to look to the defendant's status at the time the litigated events occurred.

Pet. App. at A5. Because Nuovo Pignone was a foreign state at the time of the events giving rise to this litigation, the Fifth Circuit affirmed the decision of district court finding Nuovo Pignone a foreign state under the FSIA. Pet. App. at A6.

The Fifth Circuit also found in favor of Nuovo Pignone on the application of the "commercial activities" exception of the FSIA, reversing the district court and holding expressly that Plaintiff-Petitioner failed to carry her burden of proof on the existence of a "material connection" between the alleged commercial act performed by Nuovo Pignone in the United States and her cause of action. Pet. App. at A7-A8. Addressing this issue, the Fifth Circuit wrote:

> Concededly, Nuovo Pignone did send representatives to consult on the mechanical erection of the components onto the platform; however, there is no indication in the record concerning the extent or nature of the consultation or to show it as an integral part of the design or manufacture. While this Court is told that the

> Nuovo Pignone representatives consulted, we are left to guess at what the consultation involved. There is simply no indication that the final assembly in Bayou Black [Louisiana] was a part of the design or manufacture that occurred in Italy. Thus, we cannot say that there is material connection between Nuovo Pignone sending consultants to Bayou Black and Peré's [Petitioner's] wrongful death action.

Pet. App. at A8-A9. Because Petitioner's wrongful death action alleged design and manufacturing defects as the cause of Peré's death and because Petitioner could not establish that any design or manufacturing activities were "materially connected" with the United States, the commercial activities exception could not be applied. *Id.*

In response to Plaintiff-Petitioner's waiver arguments, the Fifth Circuit took little time in holding that the execution of a contractual choice of law clause and a contractual arbitration clause by a foreign sovereign does not waive any sovereign immunity in litigation with parties not signatories to the agreement. Pet. App. at A9-A10. As Petitioner's wrongful death action was not grounded on the contract and neither Petitioner nor her decedent were parties to the contract, the alleged contractual waiver of immunity could not apply to Petitioner's action. Pet. App. at A10.

Finally, the Fifth Circuit did not address the "tiering" issue presented now to this Court, because no party (whether Petitioner or otherwise) raised the "tiering" issue in its brief to the Fifth Circuit. Pet. App. at A1; Appendix at 6, 32.

II. REASONS FOR DENYING THE WRIT

A. Petitioner and Defendant Respondent Coppus\Tuthill waived, or alternatively, abandoned the "tiering" argument as neither Petitioner nor Coppus\Tuthill presented the "tiering" argument before the Fifth Circuit.

A party who fails to advance an issue in the court of appeals effectively waives the right to assert that issue as this Court will not consider issues that were not presented to the court of appeals. *See EEOC v. Federal Labor Rel. Bd.*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983) (refusing to address issues not raised in the court of appeals); *Rodgers v. Lodge*, 458 U.S. 613, 628 n.10 (1982) (same); *see also United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981) (noting that this Court does not address issues raised by amici that were not decided by the court of appeals or argued by the interested party).

Both Petitioner and Defendant-Respondent Coppus\Tuthill suggest that alleged improper "tiering" of ownership of Nuovo Pignone is a question to be presented to this Court for review; however, neither Petitioner nor Coppus\Tuthill advanced the so-called "tiering" argument before the United States Court of Appeals for the Fifth Circuit. Appendix at 6, 32. Because no party advanced a "tiering" argument in the Fifth Circuit, the Fifth Circuit's opinion is silent on the issue. Pet. App. at A1.

Because no party advanced a "tiering" argument in the Court of Appeals and because the Fifth Circuit did not have the opportunity to rule on such an issue, it would be imprudent for this Court to now address the "tiering" argument. Accordingly, the "tiering" argument should be deemed abandoned by both Petitioner and Defendant-Respondent Coppus\Tuthill. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (holding that nonjurisdictional defects such as a waiver resulting from the failure to advance an argument in the court of appeals are properly brought to the Court's attention in respondent's brief in opposition to petition for writ of certiorari).

B. This Court Should Deny the Petition Because the Sole Basis for Seeking this Court's Discretionary Review, Namely to Resolve a Split Among Circuit Courts, Has Not Been Established.

Petitioner argues that this Court should grant her Petition pursuant to this Court's Rule 10(a) because the circuit courts are divided on each of the four issues she presents for review. Disregarding claims related to "tiering" which were abandoned in the court below, Petitioner claims that the circuit courts are split over the following issues: (1) the timing of the determination of foreign state status when a party has become a private entity; (2) in the application of the "commercial activities" exception of the FSIA, whether there must be a "material connection" or simply a "nexus" between the plaintiff's cause of action and the act performed by the foreign state in the United States in connection with commercial activities elsewhere; and (3) whether a contractual agreement

entered into by a foreign state which contains arbitration and choice of law clauses effectively waives the state's sovereign immunity under the FSIA in a tort lawsuit filed by a third party.

Petitioner errs when she alleges that the circuit courts are divided on the issue of the timing of the determination of foreign sovereign status. The fault in her argument is that she has broadened the reach of the issue presented in this case in order to create a conflict in the circuit courts; the issue presented here is more limited than Petitioner suggests to this Court. The question presented here is at what time does a court determine sovereign status for purposes of the FSIA where an entity loses its foreign sovereign status between the date of the event creating the cause of action and the date the lawsuit is filed.

In the case *sub judice,* the United States Court of Appeals for the Fifth Circuit correctly held that foreign sovereign status, in cases where the entity loses its foreign sovereign status between the event giving rise to the lawsuit and the date the lawsuit is filed, is determined at the time the events which gave rise to the lawsuit occurred. Pet. App. at A5. In rendering its decision which was one of first impression in the circuit, the Fifth Circuit joined the Sixth Circuit and the Eighth Circuit, each having squarely addressed the issue. *See Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445, 450 (6th Cir. 1988) (holding that party who was privatized during pending appeal was a foreign sovereign under the FSIA because party was a foreign sovereign at the time the events giving rise to the lawsuit occurred); *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376, 1381 (8th Cir. 1993) (holding that Air Canada was a "foreign state" under the

FSIA even though it had been privatized prior to the filing of the lawsuit).

The only circuit court alleged by Petitioner to be in conflict with the Fifth Circuit's decision on this point is the Ninth Circuit in its *Straub* decision. *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). However, as observed by the Fifth Circuit in its decision below, the *Straub* case is clearly distinguishable. Pet. App. at A5-A6. In *Straub*, the entity seeking immunity under the FSIA had become a foreign sovereign since the events giving rise to the lawsuit occurred. *Straub*, 38 F.3d at 451. In the case *sub judice*, Nuovo Pignone was a foreign state when the events giving rise to the lawsuit occurred, but became a private entity before the lawsuit was filed. The Ninth Circuit recognized the clear difference between the facts presented to it in *Straub* and those presented to the Eighth and Sixth Circuits in their decisions. *Id.* Comparing the cases, the Ninth Circuit wrote: "Neither court [Sixth or Eighth Circuit] addressed the issue of whether the FSIA applies when a party is not a foreign state at the time of the alleged wrongdoing but becomes one prior to the date on which the lawsuit is filed." *Id.* Thus, the Ninth Circuit did not address the factual scenario presented to the Fifth, Sixth and Eighth Circuits; rather, the Ninth Circuit held only that an entity qualifies for immunity under the FSIA if it is a foreign sovereign at the time the lawsuit is filed. *Id.* The *Straub* decision does not address application of the FSIA with regard to entities that were foreign sovereigns at the time of the events giving rise to the litigation but have lost that status before the plaintiff files his lawsuit. That issue, which is the one *sub judice*, was simply not before the *Straub* court.

Accordingly, *Straub* does not conflict with the decision of the Fifth Circuit Court of Appeals in this case. Because there is at present no split in the circuit courts on the timing issue presented by the Fifth Circuit's decision *sub judice*, there is no compelling reason for this Honorable Court to grant Petitioner's writ on this ground. S. Ct. R. 10(a).

Similarly, Petitioner has not demonstrated that a split in the circuit courts exists with regard to the application of the "commercial activities" exception to the FSIA. With respect to the promised conflict, Petitioner compares only two cases. Petition at 19. Petitioner asks this Court to compare the Fifth Circuit's standard applied below which requires a "material connection" between the "act" in the United States and a plaintiff's cause of action and the Ninth Circuit's allegedly more lenient standard applied in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). Any comparison of these decisions will find an identical standard being applied by the two circuits. The Fifth Circuit held (and Petitioner has not contested) that for the commercial activity exception to apply in this case, Nuovo Pignone's actions must fall within the second listed exception of 28 U.S.C. § 1605(a)(2). Pet. App. at A6. Thus, Petitioner's suit must be "based . . . upon an act performed within the United States in connection with a commercial activity of a foreign state elsewhere." 28 U.S.C. § 1605(a)(2). In *Siderman de Blake*, the Ninth Circuit examined the very standard applied to the second listed exception of § 1605(a)(2), stating:

> As the few cases to address this clause have noted, it requires a "material connection . . . between the plaintiff's cause of action and the

> act performed in the United States." *Stena Rederi AB. v. Comision de Contratos del Comite Ejecutivo General*, 923 F.2d 380, 388 (5th Cir.1991) (emphasis in original). A plaintiff must either demonstrate a causal connection between a sovereign's actions in the United States and those abroad giving rise to the plaintiff's claims, or the sovereign's acts in the United States must themselves represent an element in the plaintiff's cause of action. *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n. 22 (D.C.Cir.1982); *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 19, reprinted in 1976 U.S.C.C.A.N. 6613, 6618.

Thus, not only does the Ninth Circuit apply the same "material connection" standard relied upon by the Fifth Circuit *sub judice*, but the Ninth Circuit also cites Fifth Circuit precedent on point approvingly. The Fifth and Ninth Circuits are not split on this issue at all, but are, in fact, applying identical standards to the analysis. Accordingly, a split in the circuit courts has not been established by Petitioner on this issue; accordingly, exercise of this Court's discretion in granting the petition for writ of certiorari is unwarranted. S. Ct. R. 10(a).

Likewise, Petitioner has pointed to no conflict in the circuit courts on the FSIA waiver issue presented for review. Again, Petitioner fails in her promise to expose a conflict in the circuit courts of appeal on the interpretation of what acts constitute a waiver of immunity under the FSIA. In point of fact, Petitioner does not cite even a single decision of a court of appeals in her waiver argument. Instead, petitioner cites only three federal district court decisions in support of her allegation of a conflict in the circuits. Accordingly, the waiver issue presented by

Petitioner does not warrant, much less compel, that this Court exercise its power of certiorari. S. Ct. R. 10(a).

C. This Court Should Deny the Petition Because the Decision of the United States Court of Appeals for the Fifth Circuit is Correct.

1. The Fifth Circuit correctly found that Nuovo Pignone is a foreign state under the FSIA.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993), *quoting, Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). "Under the FSIA, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355.

Both the district court below and the Fifth Circuit properly determined that Nuovo Pignone was a "foreign state" entitled to FSIA immunity. In this regard, the applicable statutory language defines foreign state as "includ(ing) . . . an agency or instrumentality of a foreign state." 28 U.S.C. § 1603. It is undisputed that Nuovo Pignone was majority owned by ENI at the time of the October 1993 accident, and that ENI was an agency or instrumentality of the Republic of Italy at all relevant times. Pet. App. at A3.

The Fifth Circuit made the following uncontested characterization of the evidence which it viewed as dispositive of Nuovo Pignone's FSIA immunity:

> It [Nuovo Pignone] established that Ente Nazionale Idrocaburi ("ENI") was the majority shareholder [of Nuovo Pignone] at the time of the accident and that the Republic of Italy created ENI to lead Italy's oil and gas exploration and development. Thus, Nuovo Pignone argued, because ENI is an agent or instrumentality of the Italian government, it was a foreign state entitled to immunity. The district court agreed.
>
> * * *
>
> We . . . affirm the district court's finding that Nuovo Pignone is a foreign state under the FSIA.

Pet. App. at A3; A6. Petitioner does not challenge the Fifth Circuit's findings of fact, but rather avers that the time at which Nuovo Pignone's foreign sovereign status must be examined is the date a lawsuit is filed and not the date of the events giving rise to litigation.

Because Nuovo Pignone was privately held at the time Petitioner filed her action, Petitioner submits that it cannot claim immunity under the FSIA. Notwithstanding Nuovo Pignone's status as a privately owned company at the time Petitioner filed suit herein, the Fifth Circuit correctly concluded that ENI's ownership of Nuovo Pignone at the time of the accident was legally dispositive of foreign state status under the FSIA. Pet. App. at A5-A6. *See General Electric Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993) ("considerations underlying sovereign immunity are not necessarily eliminated when the defendant loses its status as a foreign state before the time of

filing suit"); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988) (holding that sovereign state status is tested at the time the underlying events giving rise to litigation occurred); *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1340 n. 33 (S.D.Tex. 1995) (defendant entitled to immunity because it was state-owned at time of plaintiff's exposure to harmful products, notwithstanding fact that defendant later became privately owned).

The only authority cited by Petitioner for the proposition that the Fifth Circuit erred in its timing determination is *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). As observed by the Fifth Circuit in its decision below, *Straub* is inapposite. "*Straub* is distinguishable because it addressed different facts. In *Straub*, the Ninth Circuit was determining how to treat a corporation that became a foreign state for FSIA purposes after the disputed events occurred but before suit was filed." Pet. App. at A5-A6. Moreover, the Ninth Circuit itself specifically distinguished its ruling in *Straub* from a case where the defendant was a foreign state at the time of the events giving rise to the lawsuit but became a private entity before suit was filed. *Straub*, 38 F.3d at 451. *Straub* simply does not address the issue presented here.

Because Petitioner has provided no authority for reversal of the Fifth Circuit's decision here, the timing issue presented by Petitioner provides no basis for a writ of certiorari.

2. The Fifth Circuit was Correct in Holding that Petitioner Failed to Carry Her Burden of Proof on the Commercial Activity Exception to the FSIA.[5]

Once a defendant establishes that it is a foreign state under the FSIA, the burden of proof shifts to the plaintiff to establish that one of the statute's exceptions applies. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993); *Walter Fuller Aircraft Sales v. Rep. of Philippines*, 965 F.2d 1375, 1383 (5th Cir. 1992); *Stena Rederi AB v. Comision De Contratos del Comite*, 923 F.2d 380, 390 n. 14 (5th Cir. 1991).

The FSIA contemplates two instances of sovereign conduct in the United States which may result in an immunity exclusion, including a "commercial activity" in the United States or an "act performed" in the United States in connection with a commercial activity of the foreign elsewhere. 28 U.S.C. § 1605(a)(2). In its decision

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[5] In the courts below, Nuovo Pignone argued that its incidental conduct in Louisiana was not a "commercial activity in the United States" or even an "act performed in the United States in connection with commercial activity elsewhere" as referenced in 28 U.S.C. § 1605(a)(2). The Fifth Circuit did not address this argument because it found that Petitioner had not proved a "material connection"between the "act" and her lawsuit even assuming she could prove that Nuovo Pignone's conduct was "an act performed in the United States in connection with commercial activity elsewhere." *Id.* Nuovo Pignone reserves its right to assert its argument on this point should this Court grant the Petitioner's Writ of Certiorari.

below, the Fifth Circuit expressly held that for the commercial activities exception to apply under the facts presented, Petitioner had to prove that Nuovo Pignone's actions fall within the second clause of § 1605(a)(2). Pet. App. at A6. Petitioner does not contest that holding here. Thus, Petitioner bears the burden of proving that her action is "based . . . upon an act performed in the United States in connection with a commercial activity elsewhere." 28 U.S.C. § 1605(a)(2).

This Court recently considered the FSIA's "based upon" requirement of the commercial activity exception in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). This Court reasoned:

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.

507 U.S. at 357 (citations omitted). Thus, in order to prove that her lawsuit is "based upon" an act performed by Nuovo Pignone in the United States in connection with commercial activity elsewhere, Petitioner must show that the "act" is an element of her claim that, if proven, would entitle her to relief under the theory of her case.

In this case, plaintiff's alleged cause of action cannot fairly be characterized as "based upon" the installation of the turbine system onto a deck platform in Louisiana. To the contrary, plaintiff's claims are based upon Nuovo

Pignone's allegedly defective design and manufacture in Italy of the internal components of the turbine system. Pet. App. at A7. There is no evidence that any commercial activity of designing or manufacturing such components occurred in the United States. In fact, the undisputed evidence is that all of the manufacturing and designing of the incident turbine occurred in Italy. Pet. App. at A8.

Nuovo Pignone's shipment of the separate turbine system components to Louisiana after their sale to CAB-GOC, and their installation onto a deck barge for transport to a West Africa coast facility is not an "element of (plaintiff's) claim that, if proven, would entitle plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. Indeed, the only evidence regarding Nuovo Pignone's involvement with the installation process in Louisiana was the fact that it sent a representative to consult. No design or manufacture occurred in Louisiana. Pet. App. at A8. Accordingly, Petitioner's wrongful death action is not "based upon" any act performed by Nuovo Pignone in the United States. 28 U.S.C. § 1605(a)(2).

In this case, the Fifth Circuit did not apply the FSIA's "based upon" requirements as instructed by *Nelson*. Instead, the Fifth Circuit applied a less stringent standard that there need only be a "material connection" between the plaintiff's cause of action and Nuovo Pignone's Louisiana conduct. Applying this standard, the Fifth Circuit wrote:

> . . . the material connection must exist between the act performed in the United States and plaintiff's cause of action. Here, then, the material connection must exist between the

> availability for consultation during final assembly in Bayou Black and Peré's allegations of wrongful death due to improper design and/or manufacture. Peré fails to show such a material connection. The components of the turbine system were manufactured, tested, and delivered to CABGOC in Italy. More importantly, once the components arrived in Bayou Black, Nuovo Pignone did not perform the final assembly; rather, it was CABCOG's contractor who performed this task. Concededly, Nuovo Pignone did send representatives to consult on the mechanical erection of the components onto the platform; however, there is no indication in the record concerning the extent or nature of the consultation or to show it as an integral part of the design or manufacture. While this Court is told that the Nuovo Pignone representatives consulted, we are left to guess at what the consultation involved. There is simply no indication that the final assembly in Bayou Black was part of the design or manufacture that occurred in Italy.

Pet. App. at A8-A9.

By concluding that plaintiff's cause of action need only be "materially connected" to Nuovo Pignone's alleged conduct in Louisiana, the Fifth Circuit disregarded the statutory requirement that the suit be "based upon" the conduct. Such a reading of the statute is inconsistent with the admonition in *Nelson* that the statute requires "something more than a mere connection with, or relation to," the incident conduct before the immunity exception will apply. *Nelson*, 507 U.S. at 358. Notwithstanding the lighter standard, the Fifth Circuit correctly

concluded that the commercial activity exception had not been proved by Petitioner. Pet. App. at A9.

3. The Fifth Circuit Correctly Found that Nuovo Pignone had not Waived its FSIA Immunity.

The only exceptions permitted to the general grant of absolute immunity to foreign sovereigns are those specifically set forth in the FSIA. *Nelson*, 507 U.S. at 355. The first exception deals with waiver of immunity by the sovereign state. Specifically, "a foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case (1) in which the foreign state has waived its immunity either explicitly or by implication . . . " 28 U.S.C. § 1605(a)(1). It is clear that Nuovo Pignone has never *explicitly* waived its immunity, and Petitioner has not suggested otherwise. Analyzing Petitioner's implied waiver argument, it is equally clear that the Fifth Circuit was correct in holding that Nuovo Pignone has not *implicitly* waived its immunity either.

The FSIA provides no guidance for determining when a foreign state has implicitly waived its immunity. Thus, courts have examined the FSIA's legislative history in this regard. That history[6] reveals that implicit waivers may be found in three situations:

1. A foreign state agrees to arbitration in another country;

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[6] H.Rep. No. 1487, 94th Cong.2d Sess.18, reprinted in 1976, U.S.C.C.A.N. 6604, 6617. *See also, Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 539 & N. 22 (5th Cir.), *cert. denied*, 506 U.S. 955, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992).

2. A foreign state agrees that a contract is governed by the laws of a particular country; and

3. The foreign state files a responsive pleading without raising the immunity defense.

"Courts have shown great reluctance to stray beyond these three examples of implicit waiver." *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993); *Coleman v. Alcolac, Inc.*, 888 F.Supp. 1388, 1403 (S.D.Tex. 1995). Indeed, since the implicit waiver clause of § 1605(a)(1) must be narrowly construed, "[c]ourts will rarely find that a nation has waived its sovereign immunity without strong evidence that waiver was what the state intended." *Rodriguez* at 287; *Coleman* at 1403.

On appeal and in this Petition, Petitioner asserts that a single contract creates an implied waiver of FSIA immunity – namely, the July 1985 "Agreement No. 133." Pet. App. at E1. Petitioner argues that the arbitration and choice of law clauses in Agreement No. 133[7] constitute an implicit waiver of sovereign immunity by Nuovo Pignone.

Petitioner's suit, however, sounds in tort and does not arise out of a contract dispute involving Agreement No. 133. Pet. App. at D1. Moreover, neither Petitioner nor her decedent are parties to Agreement No. 133. Pet. App.

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[7] Article 18 of Agreement No. 133 specifies that disputes will be resolved through arbitration in Zurich, Switzerland under the rules of the International Chamber of Commerce. Article 19 specifies that all questions relating to performance and execution of the contract are to be governed by Texas substantive law. Pet. App. at E3.

at E1. As correctly observed by the Fifth Circuit, any possible contractual waiver of sovereign immunity contained in Agreement No. 133 is irrelevant to the instant suit. Pet. App. at A10; *see also Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), *cert. denied*, by, *Fletcher's Fine Foods, Ltd. v. Gates*, 516 U.S. 869 (1995) (holding that if the action is in tort and not based upon a contract, there is no need to consider contract provisions in an FSIA waiver analysis); *Kramer v. Boeing Co.*, 705 F. Supp. 1392, 1395 (D. Minn. 1989) (holding that an implied waiver of immunity in a contract executed by a foreign state would have no waiver effect in a tort claim brought against that state). Moreover, none of the cases cited by Petitioner support her contention that an implied contractual waiver of FSIA immunity can be found here; all of the cited cases where an implied waiver was found involved disputes between signatories to the relevant contract and were disputes concerning the contract itself and not some unrelated cause of action. *See Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (finding an implied waiver of sovereign immunity in a breach of lease action between a foreign state and its lessor as a result of the terms of the lease agreement between the state and lessor); *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703, 708 (D.D.C. 1985) (finding an implied waiver of FSIA immunity in a breach of contract action filed by the seller of aircraft against Argentina where the contract between those parties contained a choice of law clause); *see also Ohntrup v. Firearms Center, Inc.* 516 F. Supp. 1281, 1285 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3rd Cir. 1985) (holding that implied waiver of sovereign immunity resulting from

arbitration clause in a contract did not apply to lawsuit filed by third party who was not a signatory to contract). Simply stated, Petitioner cites no authority that would prompt a reversal of the Fifth Circuit's decision on waiver.

CONCLUSION

Petitioner, Nancy G. Peré, asks this Court to review the decision of the United States Court of Appeals for the Fifth Circuit alleging that four reviewable issues should be examined by this Court. As shown above, Petitioner's first issue, inappropriate "tiering" of corporate ownership by a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., has been waived due to Petitioner's failure to raise the issue in the court of appeals. Petitioner's remaining issues regarding the timing of sovereign status determination, the standards applied to the "commercial activity" exception and the standards applied to find an implied contractual waiver of the Federal Sovereign Immunity Act have not been shown to be issues on which circuit courts are divided. As such, these issues do not merit this Court's review. S. Ct. R. 10(a). Moreover, the Fifth Circuit correctly decided each of the alleged issues in its reported decision. Nuovo Pignone S.p.A. is entitled to foreign sovereign status under the Foreign Sovereign Immunities Act and no exceptions to that status have been proved by Petitioners. Accordingly, Respondent, Nuovo Pignone S.p.A. respectfully submits that this Honorable Court

should deny the Petition for Writ of Certiorari filed by Plaintiff-Petitioner Nancy G. Peré.

Respectfully submitted,

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App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 97-30572

NANCY G. PERE', individually and on behalf
of her minor children,
Matthew Reed Pere' and Marci Danielle Pere'
Plaintiff-Appellee

versus

NUOVO PIGNONE S.p.A, Et Al
Defendants

NUOVO PIGNONE S.p.A.
Defendant-Appellant

and

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
Lafayette-Opelousas, Louisiana

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of her minor children,
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Defendants

NUOVO PIGNONE S.p.A.
Defendant-Appellant

and

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Cabinda Gulf Oil Company, Division of the Chevron Company	Third Party Employers of Marcus Daniel Pere'

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STATEMENT REGARDING ORAL ARGUMENT

Insofar as the issue raised by the Appellant disputes the District Court's application of prior jurisprudential holdings, Appellees assert that oral argument is unnecessary.

EXPLANATION OF RECORD REFERENCES

The record on appeal includes five volumes of pre-trial pleadings. Throughout this brief, references to these portions of the record will be as follows:

"[R. Vol. ___ at ___]"

The volume and page number will be that appearing on the page in the record on appeal.

The record on appeal also includes the following document/exhibit packages presented to the trial court in connection with the ruling at issue: (1) Attachments to Nuovo Pignone's Motion with Brief for Summary Judgment [R. Vol. 3 at 366]; and (2) Attachments to Plaintiff's Memorandum in Support of Motion for Summary Judgment [R. Vol 4. at 404]. Throughout this brief, references to these documents/exhibits will include the parties' Exhibit designation along with the page number of the Exhibit itself as well as a reference to the Record Excerpts of Appellee as follows:

"[R. Vol. ___ at ___, Exhibit ___ page ___,
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STATUTES

28 U.S.C. § 1605(a)(1) 1, 8, 18, 19

28 U.S.C. § 1605(a)(2) 1, 8, 10, 17

STATEMENT OF THE ISSUES

1. Whether the application of the "commercial activities" exception (28 U.S.C. 1605(a)(2)) to the Foreign Sovereign Immunities Act was correctly applied by the District Court.

2. Whether the District Court properly concluded that the determination for the application of foreign sovereignty at the time of the wrongdoing and not as of the time of filing of a claim.

3. Whether Appellant waived its sovereign immunity [pursuant to 28 U.S.C. 1605(a)(1)], either explicitly or by implication, by virtue of the Reconfiguration Agreement executed between Nuovo Pignone S.p.A. and Cabinda Gulf Oil Company, Ltd.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

This tragedy arises out of an October 16, 1993 explosion on the GIP-FOX platform owned by Cabinda Gulf Oil and located off the coast of Cabinda, Angola, West Africa. [R. Vol. 1 at 3] Marcus Daniel Pere´ was killed due to injuries sustained as a result of the explosion. [R. Vol. 4 at 404, Exhibit A]

Initially, several complaints asserting wrongful death claims were filed in this matter, two of which were identical suits filed in the Southern District of Texas in both the Galveston and Houston Division. [R. Vol. 1 at 19]

By Memorandum and Order issued by the Southern District of Texas-Houston Division, the claims filed in the

Southern District of Texas were transferred to the Western District of Louisiana. (R. Vol. 1 at 153-158]

Following the transfer of the claims to the Western District of Louisiana, the parties engaged in limited discovery directed toward the jurisdictional issue raised by Defendants, Pignone, Inc. and Nuovo Pignone, S.p.A., regarding the application of the Foreign Sovereign Immunities Act. Following the conclusion of all discovery, Defendant, Nuovo Pignone, S.p.A, submitted a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment with Attachments. [R. Vol. 3 at 336-368].

In opposition to the filing, Petitioners likewise submitted a Motion for Summary Judgment challenging the Defendant's immunity under the Foreign Sovereign Immunities Act and alleging that various exceptions to the Foreign Sovereign Immunities Act were applicable to Nuovo Pignone, S.p.A. thus eliminating the application of any immunity under the statute.

By Memorandum Ruling, the Honorable Rebecca Doherty denied the Defendant's request for dismissal based on immunity. [R. Vol. 5 at 524-542] The District Judge's denial was based on a finding that the Defendant, Nuovo Pignone, S.p.A. engaged in commercial activity in the United States which was materially connected to the Plaintiff's cause of action.

On May 28, 1997, Nuovo Pignone, S.p.A. filed a Notice of Appeal with this Court together with their Motion to Stay the Trial Proceedings pending the appeal. [R. Vol. 5 at 551-558]

B. Statement of Facts

The facts to this tragedy are undisputed. Marcus Daniel Pere, an employee of Chevron Overseas Petroleum and/or Cabinda Gulf Oil, was in the course and scope of his employment as an instrument technician in Angola, West Africa, when the events giving rise to this litigation occurred. On October 13, 1993, Pere´ was performing maintenance work on the GIP-FOX platform when a starter turbine located on the FC-1C turbine system, exploded causing severe and fatal injuries. [R. Vol. 1 at 21-22)

Named as Defendants in this action were the following:

(1) **Nuovo Pignone, Inc.** a foreign corporation, doing and conducting business within the State of Texas as Pignone, Inc.;

(2) **Pignone, Inc.** a New York corporation doing business within the State of Texas;

(3) **Coppus Engineering,** a foreign corporation doing business within the State of Texas;

(4) **Tuthill Corporation,** a Massachusetts corporation as successor corporation of Coppus Engineering;

(5) **AGIP Petroleum Company, Inc.,** a foreign corporation doing business within the State of Texas. [R. Vol. 1, at 20]

Petitioners' Complaint alleged as an initial cause of action, strict products liability. It was alleged that Nuovo Pignone, Inc., Pignone, Inc. and Coppus Engineering, Inc. designed, constructed, assembled and manufactured the turbine system and its components which Petitioners contend were defective, unsafe and inadequate. Specifically,

the starter turbine on the FC-1C platform was defectively designed, manufactured, modified and improperly combined with a natural gas turbine system. [R. Vol. 1 at 22-23]

Petitioners' second cause of action was founded on negligence wherein Petitioners aver that the afore mentioned [sic] Defendants were negligent in designing, manufacturing, modifying or marketing the FC-1C turbine system in question. Petitioners assert that the Defendants' negligence was the primary and proximate cause of the death of Marcus Daniel Peré.

Additionally, Petitioners' asserted a claim of gross negligence on the part of all Defendants named for designing, manufacturing, modifying and/or customizing and marketing the turbine system without proper regard for the safety of the users of the turbine system. [R. Vol. 1 at 24-25] Petitioners also alleged in their Complaint that the acts of the Defendants were violations of the Texas Deceptive Trade Practices Act and that the alleged defective condition constituted a breach of express or implied warranty. All of the allegations regarding these claims are founded on the Defendants' designing, manufacturing, distributing, modifying and/or customizing, marketing, selling and supplying the gas turbine system which exploded. [R. Vol. 1 at 25-27]

As identified in its Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of their Motion for Summary Judgment, the Petitioners provided the District Court with a brief analysis of the "Nuovo Pignone" family. Petitioners again feel as though it would benefit this Court to be apprised as to

the character and structure of these various entities. Nuovo Pignone, S.p.A. has established an elaborate system of corporate entities with Nuovo Pignone, S.p.A. being the largest of the holding companies and/or parent corporation. The limited discovery conducted revealed that there are separate corporate entities bearing the Nuovo Pignone and/or Pignone, Inc. name throughout the world. In the deposition of Dr. Mario Soncini, it was established that 100 shares of Pignone, Inc. stock is held by Nuovo Pignone International Holding Company, SA. The Nuovo Pignone International Holding Company SA shares are solely owned by Nuovo Pignone, S.p.A. [R. Vol. 4 at 404, Exhibit B page 21, Record Excerpt #3] Dr. Soncini, describes that the function and role of Pignone, Inc., the New York corporation, is as a facilitator and marketer for products produced and manufactured by Nuovo Pignone, S.p.A. within the United States. [R. Vol. 4 at 404, Exhibit C, Record Excerpt #4]

On October 5, 1979, a Purchase Order agreement was entered into between Nuovo Pignone, S.p.A. and a Delaware corporation Cabinda Gulf Oil Company. [R. Vol. 4 at 404, Exhibit E] This Purchase Order agreement reduced to writing several months of the negotiations between Gulf Oil and Nuovo Pignone, S.p.A. wherein Nuovo Pignone representatives were dispatched to Houston, Texas to negotiate the Purchase Order agreement for the sale of the turbo compressor systems.

During 1979, the turbo compressor systems, which were the object of the Purchase Order agreement, were shipped from Florence, Italy to Bayou Black, Louisiana for the assembly of all components of these various systems. [R. Vol. 4 at 404; Exhibit J at 42-49, 81-82, Record

Excerpts #1] Once these turbine systems were assembled and mounted on their respective platforms they were barged to their location off the coast of West Africa. [Id. at 43] During the entire period in which the assembly and construction occurred in Bayou Black, Nuovo Pignone, S.p.A. had representatives present to insure that the assembly was performed properly. [Id. at 83]

Subsequent to the installation of the turbine systems in Africa, the parties continued negotiations in 1985 which resulted in the perfection of Agreement No. 133, also referred to as the Reconfiguration Agreement. The work being performed pursuant to this reconfiguration agreement was best described by Nuovo Pignone representative, Raffaello, Gusso, who described the project as "an overhaul" of various compressor trains. [R. Vol. 4 at 404, Exhibit K page 16, Record Excerpts #2] The specific purpose of reconfiguring the various compressor trains on the G-FOX platform was to increase the horsepower and volume flow of gas travelling through these compressors. Gusso also confirmed that one of the compressor trains which underwent this reconfiguration procedure was the FC-1C train compressor system which was the exact compressor which exploded causing the death of Marcus Peré. [R. Vol. 4 at 404, Exhibit K page 40, Records Excerpts #2]

SUMMARY OF ARGUMENT

Defendants objected and filed their appeal based upon *their* conclusion that the District Court incorrectly applied the "commercial activities" exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(2)).

Petitioners contend and will argue that the District Court made no error in its application of the "commercial activities" exception to the Foreign Sovereign Immunities Act.

Petitioners further argue that the District Court failed to address the exception to immunity found at 28 U.S.C. 1605(a)(1) which provides that a foreign state is not subject to immunity if it has either explicitly or by implication withdrawn the waiver of immunity. Petitioners intend to bring to this Court's attention that Nuovo Pignone waived immunity when it (Nuovo Pignone) entered into Agreement No. 133 for the reconfiguration of the specific turbine system which exploded. This Agreement contains a provision providing that in the event of a dispute pursuant to the Agreement, the laws of the State of Texas would apply.

Lastly, since the standard for review for this judicial body is de novo, Petitioners would argue that the District Court improperly applied the jurisprudence regarding the issue of timing, as to whether or not Nuovo Pignone, S.p.A. should be granted immunity since it was not a foreign state at the time the Petitioners filed their Complaint.

LAW AND ARGUMENT

Applicable Standard of Review

Petitioners concur that the Defendant, Nuovo Pignone, has correctly stated that the standard of review in this matter is *de novo* pursuant to *Tubular Inspection, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 (5th Cir. 1992).

The Trial Court Properly Applied the Commercial Activities Exception to the Foreign Sovereign Immunities Act

As the introductory paragraph asserts in *Stena Redei AB v. Comision de Contratos Del Comite,* 923 F.2d 380 (5th Cir. 1991), the Foreign Sovereign Immunities Act of 1976 "has been a constant bane of the Federal judiciary". The "commercial activities" exception which is the subject of dispute in this appeal, is found at 28 U.S.C. 1605(a)(2). This subsection of the FSIA identifies three commercial acts which must be sufficiently connected to the United States to satisfy the jurisdictional nexus requirement. These three commercial acts are as follows:

1. A commercial activity carried on in the United States;

2. An act performed in the United States in connection with a commercial activity carried on outside the United States;

3. A commercial activity carried on outside the United States that has a direct effect in the United States.

In the event that the foreign sovereign engages in one of these three activities then it is not immune from the judicial process but the commercial activity must be the basis or jurisdictional nexus for the cause of action. This criteria has been adopted by this court in *Stena Redei AB v. Comision de Contratos Del Comite,* 923 F.2d 380 (5th Cir. 1991). As the District Court correctly identified, citing *Stena,* supra, the requirements under the FSIA of a connection between the Petitioners' cause of action and the commercial act of the foreign sovereign requires a direct causal connection. This court in *Stena* stated that "the

connection between the cause of action and the sovereign's commercial act in the United States must be material."

Having reviewed all of the criteria identified by this Court in *Stena,* Judge Doherty correctly applied the criteria finding that the mere act of assembly and construction of these turbine systems onto various platforms in Bayou Black, Louisiana were *materially related* to the Petitioners' claims.

Defendants seek to engage in "semantic warfare" by asserting that the District Court committed manifest and/or reversible error by failing to use the criteria identified in *Saudi Arabia v. Nelson,* 507 U.S. 349, 113 S.Ct. 1479, 123 L.Ed.2d 47 (1993). Defendants complain and assert that the trial court committed reversible error by failing to use the term "based upon" rather than "materially related" in establishing a nexus between Petitioners' causes of action and the Defendant's commercial activity. Petitioners would argue that the term "materially related" is a far stronger term than the language extracted from *Saudi Arabia v. Nelson,* supra. It is suggested to this Court that reversal is not warranted based on a lower court's determination or choice of verbiage. Petitioners would add that in the event the allegations contained in their complaint are proven, then they (Petitioners) would be entitled to an award of damages under the various theories cited.

What the Supreme Court provided in *Saudi Arabia v. Nelson,* was a clearer definition of the term "commercial activity". The Supreme Court held that:

> **"The commercial character of an act is to be determined by reference to its nature rather than its purpose, the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of action by which a private party engages in trade and traffic or commerce."**

There is no doubt and it remains undisputed that the actions of Nuovo Pignone, S.p.A. are identical to those of a private person or entity engaged in the trade of selling and marketing turbo compressor systems for mineral exploration. It is clear to the Petitioners that when adopting the *Nelson*, supra definition of "commercial activity" that Nuovo Pignone, S.p.A. has engaged in "commercial activity" within the terms of the definition cited. As will be explained later in this brief, the claims of the Petitioners are not only "based upon" the conduct of Nuovo Pignone representatives in Louisiana but also upon all of the acts within the United States engaged in by Nuovo Pignone and/or its agents, subsidiaries or employees regarding the negotiation, purchase, assembly, installation, and modification of the FC-1C turbo compressor train which exploded.

The Defendants would have this Court believe that the only isolated instance in which a representative from their company appeared in the United States was for the assembly and construction of the turbine system onto a platform in Bayou Black, Louisiana. Petitioners would

caution this Court that there exits [sic] more to the Defendants' conduct within the United States than the mere appearance of a Nuovo Pignone representative in Louisiana. As previously indicated, not only was a representative sent to Bayou Black, Louisiana, but prior to the construction of these turbine systems, representatives travelled to Houston, Texas to engage in negotiations and exchange various designs prior to the perfection of the Purchase Order agreement.

The jurisprudence has recognized that an activity is commercial if it is the type of activity which a private person or entity would commonly engage in for profit. *Callejo v. Bancomer SA*, 764 F.2d 1101, 1108 n. 6 (5th Cir. 1985); *Repsa Fabricacion SA v. Petrolcos Mexicanos*, 961 F-2d 1198 (5th Cir. 1992); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988). Additionally, various courts have held that negotiations for contract to purchase goods or services is considered to be a commercial activity within the meaning of the FSIA. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, supra *citing Texas Training and Mill, Inc. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied* 454 U.S. 1148, 102 S. Ct. 1012, 71 L. Ed. 2d 301 (1982); *Obenchain Corp. v. Corp. Nacionale de Inversiones*, 656 F.Supp. 435 (W.D. Pa. 1987). Petitioners would call to the Court's attention that not only did Nuovo Pignone, S.p.A. dispatch representatives to negotiate the purchase order agreement for the original sale of these turbo compressor systems but representatives were also sent to negotiate the reconfiguration agreement (Agreement Number 133). [R. Vol. 4 at 404, Exhibit E and F] Interestingly, these two negotiated contracts provided Nuovo Pignone, S.p.A. a total consideration of

$24,340,482.00 [R. Vol. 4 at 404, Exhibit J page 30, Record Excerpts #1, Exhibit E page 31, Record Excerpts #6, Exhibit K pages 17-18, Record Excerpts #2, and Exhibit F page 35, Record Excerpts #5]

The greatest evidence of the fact that Nuovo Pignone, S.p.A. engaged in "commercial activity" within the United States is the fact that a subsidiary of Nuovo Pignone, S.p.A., Pignone, Inc. was created and formed, as a New York corporation, solely to assist Nuovo Pignone, S.p.A. for the purposes of marketing and selling the products produced by the Defendant corporation.

The commercial activities exception also requires an analysis as to whether the entity asserting an FSIA defense has substantial contacts with the United States. This issue was discussed in *Re Rio Grande Transport, Inc.*, 516 F.Supp. 1155 (S.D. N.Y. 1981). The Court in this case denied the shipping company's motion for summary judgment with respect to its claim for immunity from jurisdiction. This claim involved a vessel collision which occurred between the continents of Europe and Africa. The, *Rio Grande* court concluded there existed sufficient jurisdictional nexus since the defendant's vessels regularly called upon U.S. ports and received substantial income from those activities.

Applying this same analysis, the United States comprises at least 20% of Nuovo Pignone, S.p.A.'s sales. It is estimated that these sales gross at or near $100 million per year [R. Vol. 4 at 404, Exhibit B page 40, Record Excerpts #3] Not only are these sales figures a significant indication of the amount of commercial activity being carried on by Nuovo Pignone, S.p.A. within the United

States, Nuovo Pignone has also created a corporate hierarchy and has opened offices for its United States subsidiary in New York, Houston, and Los Angeles. [R. Vol. 4 at 404, Exhibit C, Exhibit B pages 35-36]

As further evidence of the substantial contacts Nuovo Pignone, S.p.A. maintains in the United States, Dr. Mario Soncini identified other Nuovo Pignone customers as Mobil Oil Company, Amoco, Phillips Petroleum, Parsons Engineering, and Brown and Root. [R. Vol. 4 at 404, Exhibit B pages 38-39, Record Excerpts #3] Lastly, Petitioners would bring to this court's attention the fact that Nuovo Pignone, as a continuing marketing practice, places advertisements for its services and products in several of the recognized trade journals distributed throughout the world, including the United States. [R. Vol. at 404, Exhibit M pages 23-26]

This Court should remove the isolated view which Defendants seek to impose in attempting to defeat the application of the commercial activities exception. Defendants would like nothing more for this Court to only examine the fact that a representative from its corporate headquarters travelled to Bayou Black, Louisiana to supervise the installation and construction of the turbine systems onto the deck platforms prior to their shipment to Africa. Petitioners call to the attention of this Court, that the entire conduct and actions of Nuovo Pignone, S.p.A. should be examined to determine whether the District Court correctly applied the commercial activities exception. The evidence submitted in support of Petitioners' assertion that the commercial activities exception should be applied is abundant and plentiful. Certainly

when viewed in totality the negotiation, sale, construction, assembly and reconfiguration of the turbo compressor systems sold by Nuovo Pignone definitely have a "based upon" nexus to the Petitioners' causes of action.

In support of their position the Defendants attempt to draw an analogy to and cite *Philos v. Lot Polish Airlines*, 939 F.Supp. 199, (E.D. N.Y. 1996). Petitioners bring to the Court's attention that at no time in *Philos*, did a representative of the Russian company travel to the United States for maintenance of the alleged aircraft. As the Defendant points out, the Russian consultants maintained a station in Poland, who then communicated with third party engineers in the United States. The facts of this case can easily be distinguished from the case at bar.

In response to this, Petitioners would cite to the Court the case of *Barcanic v. C.A.A.C.*, 822 F.2d 11 (2 Cir. 1987) where the appellate panel upheld a trial court's ruling that a wrongful death action could be maintained against the Chinese government where the crash occurred in China, but the airline ticket was purchased in the United States. Specifically, the Chinese government, who owned a majority of the airline, was denied immunity from suit under the Foreign Sovereign Immunities Act based on their commercial activity. Petitioner would argue that if the purchase of a ticket constitutes "commercial activity" within the meaning of the FSIA, then certainly the multitude of actions engaged in by Nuovo Pignone in the United States constitutes "commercial activity" within the definition of 28 U.S.C. 1605 (a)(2) subjecting the Defendants to jurisdiction.

Nuovo Pignone, S.p.A. Has Waived Its Sovereign Immunity

Petitioners strongly also argue that the Defendant, Nuovo Pignone, S.p.A. has waived its sovereign immunity based upon the exception codified at 28 U.S.C. § 1605 (a)(1). Recent jurisprudence has hold that implicit waivers are found only where a foreign state has agreed to arbitration in another country, *the foreign state has agreed that the law of a particular country should govern a contract,* or the foreign state has filed responsive pleadings without raising the defense of sovereign immunity. *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir. 1995)

Petitioners assert that Nuovo Pignone, S.p.A. has implicitly waived its sovereign immunity by virtue of the Reconfiguration Agreement (Agreement No. 133) it entered into with Cabinda Gulf Oil. Specifically, on page 24 of the Agreement, provision 19, Nuovo Pignone, S.p.A. subjects itself to the laws of the State of Texas. [R. Vol. 4 at 404, Exhibit F page 24, Record Excerpts #5]

This document describes the obligations of each party as well as the "overhaul" of the FC-1C compressor train which exploded killing Marcus Daniel Pere'. [R. Vol. 4 at 404, Exhibit K page 40] As previously indicated, the purpose of the reconfiguration of the compressor trains on the GIP-FOX platform was to increase the horsepower and flow of gas travelling through the various compressors. This Agreement also contains provisions involving warranty, as well as indemnification clauses. The

warranty provisions specifically warrants that the materials and workmanship to be performed by Nuovo Pignone employees *shall be free of defect.* [R. Vol. 4 at 404, Exhibit F, provision 9.11, Record Excerpts #5]

Clearly, this contract also involves the workmanship performed by Nuovo Pignone on the exact compressor train which exploded causing the death of the Petitioner. The explicit and/or implicit waiver exception raised by the Petitioners before the District Court was not addressed in the Court's Memorandum Ruling. However, Petitioners assert that since this is a de novo review by this Court, the waiver exception found at 28 U.S.C. 1605 (a)(1) is also applicable to Nuovo Pignone, S.p.A. Petitioners argue that immunity should be denied Nuovo Pignone since it has implicitly waived the desired immunity by virtue of the reconfiguration agreement – Agreement No. 133.

Does the Foreign Sovereign Immunity Act Apply to Nuovo Pignone, S.p.A.?

As indicated previously, the Petitioners would ask this Court to review the findings of the District Court wherein it was concluded that the determination as to whether the FSIA is applicable is to be made at the time of the wrongdoing and not at the time of the filing of the complaint. In an entity known as ENI owns 61% of Nuovo Pignone stock as of October 4, 1993. [R. Vol. 4 at 404, Exhibit D] However, on the day that the complaint was filed, the majority of the Nuovo Pignone, S.p.A. stock had been transferred to a consortium of companies primarily represented by General Electric. The Petitioners

present this issue to this Appellate panel based on a split in the circuits as to when the FSIA is to be applied.

The Eighth Circuit addressed this issue in *General Electric Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993). The Eighth Circuit concluded that the determination as to whether an entity qualifies as a foreign sovereign must be examined as of the time of the complained of actions giving rise to the litigation. However, the Ninth Circuit holding in *F. Straub v. A. P. Green*, 38 F.3d 448 (9th Cir. 1994), held that a corporation identity must be examined *at the time suit is instituted.* Both of the aforecited cases have differing factual circumstances, however, Petitioners assert that the holding in *Straub*, which established that the corporation's identity should only be examined as of the date suit is filed, is in keeping with the legislative history of the FSIA. As of this time, Petitioners are unaware of any Fifth Circuit holding addressing this issue. Petitioners argue that this Circuit should adopt the criteria defined in *Straub*, supra, and look to the corporation's identity at the time of filing to determine whether the foreign sovereign immunity defense is applicable.

CONCLUSION

Petitioners strongly assert that the District Court did not err in concluding that the commercial activities exception is applicable to Nuovo Pignone, S.p.A. Petitioner, on behalf of her minor children, would ask this court to review the totality of the actions of Nuovo Pignone, S.p.A. from the initial negotiations through the perfection of the Reconfiguration Agreement it entered into regarding these turbo compressor systems. It should

be clear that when all of Nuovo Pignone's actions are taken into consideration, this Court would and should conclude that the Defendants engaged in significant commercial activity within the United States, and in particular, in regards to the FC-1C compressor train. It is for these reasons that Petitioners assert that the District Court correctly applied the commercial activities exception, stripping Nuovo Pignone of its sovereign immunity.

Petitioners further submit to this court that there has been an implicit, if not explicit, waiver of immunity by Nuovo Pignone, S.p.A. pursuant to Agreement 133. Petitioners would also argue that this implicit waiver is directly related to the causes of action identified in Petitioners' complaint. All of the Defendants' actions described by the Petitioners are clearly "based upon" the commercial activity engaged in by the Defendants in regards to the FC-1C turbo compressor train.

Since this is a de novo review of the issues presented, Petitioners request that this Court review and address the issue as to whether or not Nuovo Pignone S.p.A. is entitled to sovereign immunity under the Act since it was not a foreign state at the time of the filing of the complaint. Petitioners argue that this Circuit should adopt the holdings and reasoning of the Ninth Circuit when addressing this issue.

In conclusion, Petitioners feel as though they have "bombarded" this Court with cite after cite of sworn testimony and documentation acknowledging the commercial activities which Nuovo Pignone, S.p.A. engaged

in which were in *direct* relation to the design, manufacture, reconfiguration and servicing of the FC-1C compressor train. We submit that the evidence in sworn statements provided exposes the cabal of corporate entities created by Nuovo Pignone, S.p.A. in their effort to attempt to insulate themselves from liability while continually "sucking" millions of dollars from the U.S. market in direct competition with U.S. corporations. Petitioners will remind this Court that the total consideration paid to the Defendants under the various agreements exceeded $24,800,000.00. For the Defendants to argue before this Court that it is not engaged in commercial activity or that the commercial activity exception is not applicable is absurd!

Petitioners close by stating that based on the evidence produced, statutory provisions and Jurisprudence cited, Nuovo Pignone, S.p.A. is not entitled to immunity under the FSIA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Brief of Appellees by mailing the same by U.S. Mail, properly addressed and first class postage prepaid to the following:

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Abbeville, Louisiana, this 3rd day of February, 1998.

/s/ K. Wade Trahan
K. Wade Trahan

App. 28

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 97-30572

NANCY G. PERE', on behalf of Matthew Reed Pere',
on behalf of Marci Danielle Pere',
individually and on behalf of her minor children
Plaintiff-Appellee

versus

NUOVO PIGNONE S.p.A.;, ET AL
Defendants

NUOVO PIGNONE S.p.A.;
Defendant-Appellant

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
Lafayette-Opelousas Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-30572

NANCY G. PERE', on behalf of Matthew Reed Pere',
on behalf of Marci Danielle Pere',
individually and on behalf of her minor children
Plaintiff-Appellee

versus

NUOVO PIGNONE S.p.A.;, ET AL
Defendants

NUOVO PIGNONE S.p.A.;
Defendant-Appellant

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Nuovo Pignone S.p.A.	Defendant/Appellant
Howard Daigle, Jr. Michael D. Fisse Seale, Daigle & Ross	Attorneys for Nuovo Pignone S.p.A.
Nelson E. Canter Pino & Associates	Attorney for Nuovo Pignone S.p.A.
General Electric Company	Third-Party with current ownership interest in Nuovo Pignone S.p.A.
Cabinda Gulf Oil Company,	Third-Party Employers of Marcus Pere'

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STATEMENT REGARDING ORAL ARGUMENT

This matter involves the application of the Foreign Sovereign Immuities Act (28 U.S.C. § 1602 *et seq.*) to the clear facts of the instant matter. Accordingly, Tuthill Corporation/Coppus Engineering respectfully avers that oral argument is not necessary in the present matter.

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STATEMENT OF THE JURISDICTION

This is an appeal from a district court order rejecting Appellant's challenge to the court's subject matter jurisdiction under the Foreign Sovereign Immunities Act (28 U.S. 28 U.S.C. § 1602 *et seq.*). (T.R. p. 524) The order was entered on April 30, 1997, and a time [sic] Notice of Appeal was filed on May 28, 1997. (T.R. p. 551) The matter is immediately appealable under the collateral order doctrine. *See, Stena Rederi AB v. Comision de Contratos,* 923 F.2d 380, 385 (5th Cir. 1991).

STATEMENT OF THE ISSUES

1. Whether the trial court correctly found the commercial activities engaged in by Nuovo Pignone S.p.A.

deprived it of immunity under the "commercial activities" exception of the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(2)).

2. Whether a corporation, which was majority owned by a foreign sovereign at the time a claim arose, but was not so owned at the time suit was filed, is entitled to protection under the Foreign Sovereign Immunities Act.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

This matter arises out of an accident which occurred off the coast of Angola, Africa, in 1993. As a result of the accident, Marcus Peré was killed. His widow, Nancy Peré, instituted this action in the District Court for the Western District of Louisiana, setting forth a claim under the Death on the High Seas Act (46 U.S.C. § 761 *et seq.*), and naming as defendants, Nuovo Pignone, Inc., Tuthill Corporation, Coppus Engineering and AGIP Petroleum Company, Inc. (T.R. p. 1-4); plaintiff also filed suits against the same defendants in the District Courts for the Southern District of Texas, Galveston and Houston Divisions, alleging claims for products liability. The Galveston suit was dismissed due to the pendency of the Houston claim and the Houston claim was then dismissed due to the pendency of the instant matter. The Houston claim was then reinstated and transferred to the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a), and was consolidated with the DOHSA claims. (T.R. p. 18, 153-158) Plaintiffs claims against AGIP USA, Inc. were dismissed

by the trial court for lack of personal jurisdiction. (T.R. p. 550)

Nuovo Pignone S.p.A. (Pignone) filed a Motion for Summary Judgment, alleging that it was entitled to immunity under the Foreign Sovereign Immunities Act, and plaintiff filed a Cross Motion for Summary Judgment seeking a ruling that Pignone was not entitled to such immunity. (T.R. p. 336, 372) The trial court found that the motion filed by Pignone was more properly considered a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. Pro. 12(b)(1). (T.R. p. 527) The trial court then found that Pignone was majority owned by ENI, an agency or instrumentality of the Italian government at the time of the accident, but was sold and the majority of its stock held by a private consortium led by General Electric at the time suit was filed. (T.R. p. 531, 538) The trial court then held that the time for determining the applicability of the FSIA is at the time of the events giving rise to its action. (T.R. p. 536-537) Although the court found that Pignone was an agency of the Italian government at the time of the accident, she found that Pignone had engaged in commercial activities within the United States that were materially connected to the plaintiff's cause of action. The motion was therefor [sic] denied. (T.R. p. 542)

B. STATEMENT OF THE FACTS

In 1974, AGIP USA, Inc. (AGIP) placed an order for starter turbines with then Coppus Engineering Corp. (Coppus). AGIP was a procurement agent for Pignone

located in the United States. (T.R. p. 423) In approximately July, 1974, Coppus delivered the starter compressors, including the subject starter compressor, and same were apparently shipped to Nuovo Pignone in Florence, Italy by AGIP.

On or about October 5, 1979, a Purchase Order Agreement was entered into between Pignone, Cabinda Gulf Oil Company (CABGOC), and Sociedade Nacional de Combustivels (SONIGAL). Negotiations for the Purchase Order Agreement occurred between the representatives of Pignone and the other principals in Houston, Texas and Florence, Italy. (T.R. p. 424) Subsequently, Pignone partially manufactured and assembled the contemplated turbo compressor systems, and shipped the incomplete packages for the turbo compressors to Bayou Black, Louisiana for final manufacturing and assembly onto the platform. (T.R. p. 423, 425-426) In addition to sending the partially completed turbo compressor systems to Louisiana, Pignone also provided personnel to supervise their final assembly and installation on the platform. (T.R. p. 423) After completion of the manufacture and assembly of the various platforms, same were shipped from Bayou Black, Louisiana to the Molongo Field in Cabinda, Angola Africa.

On June 10, 1985, Pignone and CABGOC entered into a Reconfiguration Agreement (Agreement Number 133) to reconfigure the FC1C compressor train (the subject turbo compressor). (Attached as Exhibit "F" to Plaintiff's Motion for Summary Judgment and filed in the record separately as an exhibit.) (T.R. p. 404) Negotiations for Agreement Number 133 took place in both Houston, Texas and Florence, Italy. Two other contracts were

entered into between Pignone and Cabinda Gulf Oil when Agreement Numbers 1076 and 1149 were negotiated for the servicing of the turbo compressor systems at the Cabinda field. Agreement 1076 was dated September 1, 1992, and executed May 31, 1993. Agreement Number 1149 had a commencement date of March 1, 1993. (Attached as Exhibits "G" and "H", respectively, to Plaintiff's Motion for Summary Judgment and filed in the record separately as an exhibit.) (T.R. p. 404) The subject accident occurred during the servicing of the subject compressors and a Pignone representative was on location at the time of the accident. (Attached as Exhibit "L" to Plaintiff's Motion for Summary Judgment and filed in the record separately as an exhibit.) (T.R. p. 404)

SUMMARY OF THE ARGUMENT

The District Court properly found that the commercial activities of the exception of the Foreign Sovereign Immunities Act applied where the defendant seeking immunity engaged in both marketing and sales of their product within the United States, and also partially manufactured/assembled the subject turbo compressors in Bayou Black, Louisiana. The Court found that this is a products liability act by plaintiff, which alleges the items specifically assembled in the State of Louisiana, such that plaintiff's cause of action was based upon the commercial activities of Nuovo Pignone S.p.A. within the United States.

This defendant would further aver that the purpose of the FSIA is best forwarded by a determination of status under the Act at the time suit is filed, rather than at the time the acts giving rise to the cause of action took place.

ARGUMENT

Nuovo Pignone S.p.A. has raised the Foreign Sovereign Immunities Act defense (FSIA). The FSIA (28 U.S.C. § 1603),[1] sets forth the sole and exclusive standard to be used to resolve all sovereign immunities issues raised in federal and state courts. While the FSIA recognizes the

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[1] For purpose of this chapter –

(a) A "foreign state", except as sued in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means an entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332© and (d) of this title, nor created under the laws of any third country.

© The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

general rule that foreign states are entitled to immunity from jurisdiction in American courts, § 1605 codifies several exceptions to that rule. *Arriba, Ltd. v. Petroleos Mexicanos,* 1962 F.2d 528, 532 (C.A. 5, Tex 1992)

> The foreign state bears the burden for persuasion on the issue of immunity under the FSIA, but once a *prima facia* showing of immunity has been made, the plaintiff seeking to litigate "in the district court bears the burden of coming forward with facts showing that an exception applies." *Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (C.A. 5) (Miss. 1994).

The ultimate burden of persuasion remains at all times upon the party forwarding the FSIA defense. *Forsythe v. Saudi Arabian Airlines Corp.,* 885 F.2d 285, 289 (C.A. 5) (1989).

I. THE TRIAL COURT CORRECTLY DETERMINED THAT NUOVO PIGNONE ENGAGED IN COMMERCIAL ACTIVITY IN THE UNITED STATES AND WAS THEREFORE NOT ENTITLED TO IMMUNITY UNDER THE FSIA.

28 U.S.C. § 1605 provides the general exceptions to jurisdictional immunities of a foreign state. The applicable portions of § 1605 state:

> "A foreign state shall not be immune from the jurisdiction from the courts of the United States or of the states in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver

> which the foreign state may purport to effect in accordance with the terms of the waiver; and
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, and that act causes a direct effect in the United States . . .

§ 1603(d) defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. § 1603(e) further provides, "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States."

"Legislative history indicates that Congress intended to adopt the so-called 'restrictive theory' of sovereign immunity; that is the sovereignty of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." *The Export Group v. Reef Industries, Inc.*, 54 F.3d 1466 (9th Cir. 1995).

As stated above, the Act provides that commercial activity must either be a regular course of commercial conduct or a particular commercial transaction or act. In the present case, it is clear that Pignone engaged in a

regular course of commercial conduct in that it conducted business in the United States itself and through its subsidiary, Pignone, Inc.[2], and that it intended to have a presence in the United States sales market. (T.R. p. 433) In 1993, Pignone recorded some $100 million in U.S. sales, which represented some 10-15% of the income, not including its textile market. (T.R. p. 434)

The fact that Nuovo Pignone S.p.A. is engaging in commercial conduct in the United States is irrefutable. It has been operating as any other private company has been operating and this fact is further buttressed by its eventual sale to General Electric in 1993. The activities of Nuovo Pignone S.p.A. do not have any sovereign character about them. The activities included the manufacture and sale of turbo compressor units within the United States similar to that performed by many other private organizations throughout the world.

Pignone argues that plaintiff's claims are not "based upon" its commercial activities in the United States. As stated in Pignone's brief, the Supreme Court in *Saudi v. Nelson*, supra, found the statute provides no definition of the phrase "based upon", but that the phrase is "read most naturally to mean those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case." *Id.* at 357. The Court further stated that it was not necessary that each and every element of the

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[2] Pignone, Inc. was a wholly owned subsidiary of Nuovo Pignone S.p.A. and was a New York corporation. The corporate purpose of Pignone, Inc. was to market and promote the products of Nuovo Pignone S.p.A. in the United States. (T.R. p. 429)

claim be commercial activity by the foreign state. *Id.* at Fn. 4. In that case, the plaintiff sought damages resulting from imprisonment and torture while he was in Saudi Arabia. The Court found that the activity in question, the use of police power, was particularly sovereign in nature since persons in the private sector cannot exercise the powers of police and penal officers. "Such acts as legislation, or the expulsion of an alien, or denial of justice cannot be performed by an individual acting in his own name." *Id.* at 1480.

The instant matter is a products liability claim brought by the widow of Marcus Pere´ for his wrongful death. Plaintiff has alleged (in the Texas action which has been joined with this action) that Pignone negligently designed, manufactured, modified, and marketed the turbine system, which is the subject of this lawsuit. (T.R. p. 22) Nuovo Pignone S.p.A. has admitted that at least some of the manufacturing/assembly and marketing was performed in the United States. (T.R. p. 423)

Pignone points out that no disassembly of the turbines was necessary before shipping the huge turbines from Italy to Louisiana. That is because the incomplete components such as the electrical panels, ducting, compressor tank, the exhaust system were finally assembled in Louisiana. (T.R. p. 426) In other words, the manufacture of the turbines was not completed until the turbines were in the United States. The corporate representative presented for deposition did not know how many

persons were sent by Pignone to supervise the completion of the manufacturing process. (T.R. p. 423)[3]

This Court reviewed a factually similar case in *Aldy v. Valmet Paper Machinery*, 74 F.3d 72 (5th Cir. 1996). In *Aldy*, there was no dispute that the defendant was a "foreign sovereign" that designed and manufactured paper machine in Finland. One of those machines killed two persons and the wrongful death claim ensued. *Id.* at *75.* The court found that plaintiffs' suit appeared to be a classic design and manufacturing defect suit, which it found was covered by the Commercial Activities Exception of the Act.[4] *Id.* at *75.* In reaching that conclusion, this Court stated:

> The plain language of the provision limits our analysis to determining whether the Aldys' and Malones' lawsuits are 1) based upon an act outside the U.S., 2) that was taken in connection with a commercial activity of Valmet outside the U.S.; and 3) that caused a direct effect in the *U.S. Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S.Ct. 2160, 2164, 119 L.Ed. 2d 394 (1992).

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[3] It is interesting to note that Pignone refers to the testimony of Cioncolini as vague and speculative when he was presented as the Manager of Gas and Compressor Sales at the time of this manufacture. Further, he was produced pursuant to a 30(b)(6) Notice of Deposition of Pignone. (T. R. p. 244)

[4] This Court utilized the third clause of the Commercial Activities Exception finding that the action was based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, which caused a direct effect in the United States.

> The first two elements ensure that "there must be a connection between the plaintiff's cause of action and the *commercial acts* of the foreign sovereign." *Stena Rederi*, 923 F.2d at 386 (emphasis added). The Aldys' and Malones' suits are based upon the commercial acts of Valmet outside the U.S. Valmet does not dispute that it is in the business of designing and manufacturing paper machines in Finland, nor does it dispute that it designed and manufactured the paper machine in which Aldy and Malone were killed. Moreover, the gravamen of the plaintiffs' suits are that the paper machine "was unreasonably dangerous in its construction, make-up composition and design." In short, the plaintiffs' suits appear to be classic design and manufacturing defect suits, which the third clause of the commercial activities exception is broad enough to cover. *Id.* at 75 (*Citing, Ohntrup v. Firearms Center Inc.*, 516 F.Supp. 1281, 1286-87 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985)).

Defendants submit that *Aldy* supports the proposition that the plaintiffs products liability claims are "based upon" Pignone's commercial activities in the United States where at least some of the manufacturing took place.

Defendants would submit that Pignone engaged in a regular course of commercial conduct within the United States, and that plaintiffs' claim is based upon a particular transaction that occurred within the United States, either of which conveys jurisdiction under § 1605(2). The subject turbine was marketed and sold within the United

States, then partially manufactured in Bayou Black, Louisiana. Pignone should not be entitled to sovereign immunity under these facts.

II. THE DETERMINATION OF FSIA STATUS SHOULD BE MADE AT THE TIME OF FILING OF SUIT

It is undisputed that at the time suit was filed in the instant matter that Nuovo Pignone S.p.A. was majority owned by a group of investors led by General Electric Corporation, a U.S. corporation. In the event this Court should find that Pignone did not fall within the commercial activities exception, defendants submit that under the Act, the status of a sovereign state should be made at the time of filing of suit to comport with the purpose of the Act.

Defendants readily admit that courts have not resolved the question of whether one must look at the time of the events allegedly giving rise to the liability to determine whether an entity is a "foreign state" under the Act, or to the time at which the action is brought. In *Straub v. AP Green, Inc.*, 38 F.2d 448 (C.A. 9, 1994), the court held that one must look to the time when the lawsuit was filed to make the determination, perhaps even if the entity did not have foreign state status at the time of the alleged wrong-doing. The court in *General Electric Corp. v. Grossman*, 991 So.2d 1376 (8th Cir. 1993), reached the conclusion that status must be determined as of the time of the complained of actions giving rise to the suit.

Defendants would submit examination of the purpose of the Foreign Sovereign Immunities Act supports the conclusion reached in *Straub*. Congress enunciated the purpose of the Foreign Sovereign Immunities Act in 28 U.S.C. § 1602 as follows:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Courts have also interpreted the Act's purpose as "designed to promote harmonious international relations by respecting governmental immunities recognized in international law while permitting claims arising out of ordinary commercial activities." *Pullman Construction Industries, Inc, v. United States of America*, 23 F.3d 1166, 1169 (1994), citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471 (1993).

It is respectfully submitted that since the purpose of the Act was to promote "harmonious international relations," the appropriate time for determining the status of an entity claiming immunity under the FSIA is the time of

filing suit. It is only logical that international relations are unaffected, at least in most cases[5], in a suit against an entity which was formerly clothed with immunity, but now a member of the private sector. Certainly, under the facts of the present case, no governmental purpose is achieved by clothing a machinery corporation now owned by a domestic company with immunity.

It is, therefore, respectfully submitted that the Court should look to the date of filing of suit for the determination on the issue of status and, thereby, reject the claims for immunity by Nuovo Pignone S.p.A.

CONCLUSION

The trial court properly determined that Nuovo Pignone S.p.A. engaged in commercial activity in the United States materially connected to the plaintiff's cause of action such that it is not entitled to immunity under the FSIA and should be affirmed. Defendant would alternatively submit that the appropriate time to consider the application of the FSIA is at the time suit is filed, which

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[5] Defendants could conceive of cases where a government may have an interest in maintaining the immunity for a foreign entity which was formerly a foreign state to protect the national security of that foreign state due to confidential information being held by that entity.

would also lead to an affirmation of the trial court's decision.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

NANCY G. PERÉ, individually and on behalf of her minor children, Matthew Reed Peré and Marci Danielle Peré,

Petitioner,

versus

NUOVO PIGNONE S.p.A., et al.,

Respondents.

On Petition For Writ Of Certiorari To Review Decision Of The Fifth Circuit Court Of Appeals

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Tuthill Corporation and Coppus Engineering	Defendants in Principal Action Aligned with Plaintiffs on writ application
Nuovo Pignone, S.p.A.	Defendant/Respondent
General Electric Company	Defendants in Principal Action
Cabinda Gulf Oil Company, Division of the Chevron Company	Defendants in Principal Action

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REPLY ARGUMENT

The question of "tiering" – the question whether or not Nuovo Pignone qualifies as a "foreign sovereign" – has been a principal issue in this litigation. The district judge dealt with that issue as much as any other in her opinion. And she pointed out the split between the Ninth Circuit's decision in *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir. 1995), and the decision by the Seventh Circuit in *In Re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994,* 96 F.3d 932 (7th Cir. 1996), which rejected the *Gates* analysis. Judge Doherty found other courts were following *In Re Air Crash Disaster,* although she found "The *Gates* court's statutory interpretation argument is strong and persuasive." Pet – B13. "However, the weight of authorities seems to be against this interpretation of the FSIA. District courts within the Fifth Circuit have found that entities indirectly owned by a foreign state are agencies or instrumentalities of foreign states." Id.

Judge Doherty's whole analysis of the "tiering" issue involves setting out the "split" in the circuits on this important matter.

Nuovo Pignone, in its opposition brief, asserts this Court cannot consider the "tiering" issue because it was not treated by the Fifth Circuit on appeal. Of course, the appeal to the Fifth Circuit was not taken by Nancy Peré; and when Nuovo Pignone appealed, it did not argue tiering, because Judge Doherty's ruling had been in its favor. The focus of the proceeding before the Fifth Circuit was on the "commercial activity" issue.

Normally, this Court does not consider issues raised for the first time on Certiorari and not dealt with by the lower courts. *Lurk v. U.S.*, 370 U.S. 530 (1962); *City of Houston Tex. v. Hill*, 482 U.S. 451 (1987). An argument "inadequately preserved" in lower court proceedings will not be considered by the Supreme Court. *Auer v. Robbins*, 519 U.S. 452 (1997). And the Supreme Court will not consider an issue which the Petitioner failed to raise in the Petition for Certiorari. U.S. Supreme Court Rules 14.1(a), 24.1(a); *Chadris, Inc. v. Latsis*, 515 U.S. 347 (1995).

But there is no hard-and-fast rule that this Court will never consider issues raised in the Petition for Certiorari, which were not disputed in the Court of Appeals. As to the question of "tiering" in our case, that issue was raised, briefed, and argued before the Trial Court. The Trial Court decided the matter and pointed out the clear split between circuits. Now, the "tiering" issue has been raised and briefed in Peré's Petition for Certiorari. All facts necessary for decision are in the record. The tiering issue is a major issue in this litigation, and raising it on certiorari does not present respondent with any unfair surprise.

This Court certainly has the power and right to consider issues that were not raised before the Court of Appeal. *Schiro v. Farley*, 510 U.S. 222, 114 Sup. Ct. 783, 127 L. Ed. 2d 47 (1994); *Ledron v. National R. R. Passenger Corp.*, 513 U.S. 374 (1995); *U.S. v. Williams*, 504 U.S. 36 (1992). This is especially true when the matter is important to the administration of federal law, and there is need to resolve uncertainties in the law. *Virginia Bank Shares, Inc. v. Sandberg*, 501 U.S. 1083 (1991).

The "tiering" issue presents a matter of central importance in administration of the FSIA, there is a split in the circuits causing uncertainty and a lack of uniformity which must be resolved. Additionally, resolution of that conflict is necessary to resolving the Peré's claim in a just and fair way. The issue was briefed in the trial court, evidence was presented; the trial judge addressed tiering in her decision; but Nuovo Pignone did not raise the issue on its appeal to the Fifth Circuit, and neither did Peré.

Nuovo Pignone argues that *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is dispositive of the "tiering" issue. But the *Nelsen* case involved a plaintiff who was detained and tortured by the Saudi government, while an employee at a Saudi hospital. Essentially, this Court decided Plaintiff's injuries were caused by police misconduct which did not constitute "commercial activity". Furthermore, Nelson was unable to show anything that happened here in the United States relevant to the torture he suffered in Saudi Arabia. The Court said any connection between Nelson's recruitment here and his torture in Saudi Arabia was "far too tenuous to support jurisdiction".

In *Nelson*, this Court emphasizes that the Saudi government's tortious conduct did not comprise a "commercial activity", and that the FSIA does not give jurisdiction to our courts in matters involving a foreign state's "internal administrative acts". Id., U.S. p. 361.

The suit by Mrs. Peré and her children involves allegations of negligence and fault occurring in the United

States (where the faulty compressor starter was manufactured and purchased), and by U.S. companies working offshore from Angola (the starter engine was serviced by U.S. service companies), and resulting from a "reconfiguration" and reinstallation of the starter engine aboard the offshore platform (performed at Bayou Black, Louisiana). This suit definitely involves a "commercial activity" – Nuovo Pignone was doing precisely the same kind of business as its non-government competitors, and for profit. And most of the negligent acts alleged occurred either in the United States or aboard the offshore platform, not in Italy.

Additionally, the Peré causes of action arise out of work and relationships (purchase, handling, servicing, reconfiguration, and installation of a piece of equipment) governed by "contracts" entered into between Nuovo Pignone and U.S. corporations. This is a *tort* action arising out of activities governed by *contracts.* And the explosion and death of Mr. Peré occurred because of faulty performance by parties (breach of duties owed) under those *contracts.*

In a concurring opinion in *Nelson,* Justice White considers an argument not raised in the trial and appellate courts, and points out that "The purpose of the commercial exception [is] to prevent foreign states from taking refuge behind their sovereignty when they act as market participants. . . . " Id., U.S., p. 368.

In their dissents, Justices Kennedy, Blackmun, and Stevens say they believed the lawsuit should not have been dismissed, and that there was FSIA jurisdiction. They also note that the question of right of recovery for

tort depends on state law and is of no concern to the federal court when considering FSIA jurisdiction:

> As a matter of substantive tort law, it is not a novel proposition or a play on words to describe with precision the conduct upon which various causes of action are based and to recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong. See, Restatement (Second) of Torts, §§ 447-449 (1965). *Nelson, id., U.S., p. 375.*

Justice Stevens, in his dissenting opinion, believed Saudi Arabia *was* engaged in commercial activities that had "sufficient contact with the United States to justify the exercise of federal jurisdiction". Id., U.S., p. 377. He pointed out that the Saudi government maintained an office in Maryland, purchased hospital supplies and equipment in this country, that the hospital's American agent maintained an office in the United States. . . . We have already shown that Nuovo Pignone has far more contacts than these in the United States; and the Peré suit alleges a defective starter engine that exploded because of negligence in its manufacture, repair, servicing, "reconfiguration", and reinstallation aboard the platform. Some of these negligent actions occurred here in the United States, others elsewhere.

Justice Stevens points out that there are widely divergent possible interpretations of § 1605(a)(2): On the one hand, the provision can be read to give a broad "general" jurisdiction over foreign entities that engage in substantial commercial activities in this country; and, on the other hand, it can be read to grant only a narrow "specific" jurisdiction over particular commercial claims that

have a substantial contact with the United States. He believed this Court should have accepted jurisdiction on Nelson's tort action:

> If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone for our inquiry; . . . When a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by the marketplace. *Id., U.S., p. 379.*

Peré was killed by a defective starter engine. A good number of contracts affected that starter engine, and Peré's claim involves duties of the defendants in their contractual capacities as "manufacturer", "designer", "reconfigurer", "installer", and service companies charged with "maintenance and repair" of the compressor engine with its starter. A whole contractual régime surrounded operation of the compressor engine aboard the platform off the coast of Angola. And that contractual régime involved contracts entered into in the United States between Nuovo Pignone and a number of U.S. companies.

Peré has shown the Court that in one of the more recent contracts, Nuovo Pignone has waived its sovereign immunity rights and agreed to arbitration and decision of disputes on the basis of the law of Texas. Peré believes that the waiver in that contract and agreement establishes Nuovo Pignone's concession to be treated as a private business player, and not a sovereign entity, in its relations with other parties to the contractual régime. Peré worked

and was killed in the context of the régime set up by those contracts. We do not believe it necessary to establish that our suit is a suit on the very contract in which the waiver occurred, as Nuovo Pignone argues in its opposition brief.

The Court needs to clarify and specify principles governing the reach of contractual waivers. The cases cited by Nuovo Pignone in its opposition brief do not fit the case at bar. Lower courts have tried a number of approaches, but a uniform understanding and outcome is needed – one that recognizes the need to assure a fair handling of tort claims by American citizens killed and maimed far from home.

Respectfully submitted,

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